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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., *et al.*,
Petitioners

v.

POSTMASTER GENERAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. When older employees protected by the ADEA establish that a "particular employment practice" (*Wards Cove Packing Co.* v. *Atonio*, Slip Op. at 13) has a disparate adverse impact on them, may a court dismiss their claims on the ground that the practice is not "freestanding," but is part of a policy that, taken as a whole, has not discriminated against older workers as a group?

2. (a) Did the Court of Appeals err by holding that the ADEA does not forbid an employer from selecting employees for adverse treatment on the basis of a factor which is indistinguishable from age, so long as that employer has no animus towards older workers?

(b) Even assuming that the nonexistence of animus is relevant, may a court conclude that such animus was not present on the basis of a justification for the employer's policy which the employer never articulated?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 863 F.2d 994, and is reprinted at pp. 1-38 of the separately bound Appendix ("A.").[1] The opinion of the District Court is reported at 667 F. Supp. 6, and is reprinted at A. 39-87. The Court of Appeals' orders denying rehearing and rehearing *en banc* are at A. 88-90.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 633a. The judgment of the Court of Appeals was entered on December 20, 1988. The Court of Appeals denied petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc on March 2, 1989. On May 22, 1989, Chief Justice Rehnquist extended the time for filing this petition to and including June 30,

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[1] The trial transcript is cited as "Tr. ——." Plaintiffs' exhibits from the trial are cited as "Pl. Exh. ——."

1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, 81 Stat. 603, as amended, 29 U.S.C. §§ 623 and 633a (the "ADEA" or the "Act"):

> § 623. Prohibition of age discrimination
>
> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; * * *
>
> § 633a. Nondiscrimination on account of age in Federal Government employment
>
> (a) Federal agencies affected
>
> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) * * * in the United States Postal Service * * * shall be made free from any discrimination based on age.

STATEMENT OF THE CASE

This case arises from the decision of respondent United States Postal Service ("Postal Service") to solve a manpower shortage in New York, Los Angeles and twelve other Major Metropolitan Areas ("MMAs") by ordering the involuntary transfer of its most senior employees to

those cities (the "senior-first rule"). Petitioners are a class of United States Postal Inspectors subject to the senior-first rule. This policy carries a high emotional and financial cost for petitioners and their families, and the District Court found that it "adversely affects the older Postal Inspectors because the cost of living and housing in New York City and the other thirteen MMAs is significantly higher" than the towns where petitioners once resided. A. 44. The District Court and the Court of Appeals agreed that the practice of directed (involuntary) transfer based on seniority ensured that the oldest employees would be transferred to the MMAs. However, whereas the District Court held that this violated the ADEA under both disparate impact and disparate treatment theories, the Court of Appeals excused the Postal Service's action on the ground that the senior-first rule was not a "freestanding employment practice" and for that reason could not be challenged separately by petitioners.

A. The Inspection Service and the Career Path Policy

The Postal Inspection Service is the audit and law enforcement arm of the Postal Service. Its employees, known as Postal Inspectors, are responsible for ensuring the safety of the U.S. mail and postal employees. The Inspection Service is administered by the Chief Postal Inspector, who reports directly to the Postmaster General, and is divided into Regions and then into Divisions. Each Division consists of "domiciles," which are the individual city offices of the Inspection Service, staffed by Postal Inspectors. A. 46.

After eleven weeks of training, a new Postal Inspector spends one year as a level 17 Inspector, one year at level 19, and two years at level 21 before receiving an automatic promotion to level 23, which is the highest non-administrative post for an Inspector.[2] The significant

[2] This promotion schedule took effect in late 1983. Prior to 1983, Inspectors were promoted from level 17 to level 19 after

difference between Level 21 and Level 23 Inspectors is the work they are assigned. Level 21 Inspectors receive assignments in all four of the "functional areas" of audit, fraud and prohibited mailings, external crimes (committed against the Postal Service by non-employees) and internal crimes (committed against the Postal Service by employees). Level 23 Inspectors specialize in a single functional area and receive assignments only in that area. A. 47.

In 1978, the Inspection Service faced difficulty in staffing its domiciles in New York, Los Angeles and Chicago with Level 23 Inspectors. The Postal Service chose to fill its need for more Inspectors by creating what it called the Career Path Policy ("CPP"). Under the CPP, a vacancy in an MMA was filled as follows: First, the Postal Service sought volunteers for the position from among all Level 23 Inspectors. The first Inspector to volunteer was awarded the vacancy. Seniority was not considered. Second, if the vacancy was not filled by volunteers, the Postal Service advertised the position nationwide for bid by Level 21 Inspectors for promotion to the Level 23 position in that MMA. If only one Level 21 Inspector applied, he received the position as long as he met the minimum requirements for promotion to Level 23. If more than one Level 21 Inspector applied for the position, it was awarded to the most qualified (not the most senior) bidder. Third, if the volunteer or bid system failed to fill the vacancy, the Postal Service *directed* the most senior Level 23 Inspector in the nation to transfer to the vacant position. A. 48-50.

At trial, Chief Inspector Clauson testified that he knew, prior to adoption of the senior-first rule, that the more senior Inspectors were also the older Inspectors. A. 73,

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one year of satisfactory service, from level 19 to level 21 after one and a half years of service, and were promoted to level 23 on a competitive basis regardless of the amount of time served at level 21. A.47.

74, 79, 83. In practical terms, this meant that he knew that older Inspectors would be placed at the top of the transfer list, and unless all vacancies were filled by volunteers, older Inspectors would be the first transferred involuntarily. In fact, the first twenty Inspectors so transferred under the senior-first rule were all over the age of 40. (Pl. Exh. 52) Chief Inspector Clauson's testimony formed the basis for the District Court's finding (not disturbed on appeal) that "seniority was used as a proxy for age." A. 82.

The CPP states that it is Inspection Service "policy" that all Inspectors serve five years in an MMA. A. 5. In fact, an elaborate series of exceptions excluded many Inspectors from that obligation. Indeed, respondent's expert witness testified at trial that in light of those exceptions, "it is simply not true that everyone eligible was going to go" to an MMA. (Tr. 301-02) As the District Court found, the exceptions included: (a) a two-year exemption for any Inspector who relocated, (b) a permanent exemption for all Inspectors who had previously served five (originally two) years in an MMA, even if they had done so as trainees, and (c) all Inspectors within five years of retirement received permanent exemptions. A. 49-50. The last provision meant that any Inspector not transferred by the end of his fifteenth year of service[3] gained a permanent exemption. Any given Inspector had a better chance of acquiring exempt status if he was placed at the bottom of the transfer list than if he was placed at the top of the list. Senior Inspectors were placed at the top.

B. Proceedings in the District Court

The senior-first rule created obvious hardships for petitioners, most of whom had lived with their families for years in their present towns and cities, and all of whom

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[3] As federal law enforcement officers, Postal Inspectors are entitled to retire after reaching the age of 55 or twenty years of service. 5 U.S.C. § 8335(b).

faced a substantial increase in the cost of living in the cities to which they received directed transfers. A. 44, 75. Petitioners filed complaints with respondent and then with the Equal Employment Opportunity Commission, alleging that the senior-first rule violated the ADEA under theories of both disparate treatment and disparate impact. Two separate groups of plaintiffs then filed suit against the Postal Service in the United States District Court for the Middle District of Florida (in 1982) (the Netherton action) and the District of Columbia (in 1985) (the Arnold action). The Netherton action was transferred to the District of Columbia in 1985, and the cases were consolidated by consent of the parties pursuant to Fed. R. Civ. P. 42(a). A. 50-53. Prior to trial, the District Court denied cross-motions for summary judgment and certified petitioners' claims as a single class action pursuant to Fed. R. Civ. P. 23(b)(2). A. 53-59.

At a three-day trial, plaintiffs' expert (Dr. Charles Mann) presented a number of statistical analyses, each of which established that the senior-first transfer rule fell more harshly on older Inspectors. Dr. Mann's testimony was not directly challenged by the Postal Service's expert, Dr. Beckett, who instead concentrated on attempting to establish that the Career Path "package," taken as a whole, did not discriminate. The District Court accepted Dr. Mann's testimony in finding that petitioners had made out cases of disparate impact and disparate treatment. A. 68-75.

First, Dr. Mann and Dr. Beckett agreed that there was a statistically significant correlation between age and seniority among Level 23 Postal Inspectors. This correlation remained significant whether one examined all Level 23 Inspectors eligible for transfer, all Level 23 Inspectors, or all Inspectors regardless of grade. Indeed, the level of significance was always such that the odds are less than 1 in 1,000 that the correlation could have occurred by chance. A. 72-73.

Second, Dr. Mann testified (and Dr. Beckett agreed) that Inspectors 40 years of age and older were disproportionately placed in the top two deciles of the directed transfer list. Again, the odds that this disparity could be explained by chance were less than 1 in 1,000. Chief Inspector Clauson conceded that, before the senior-first rule was implemented, he knew older Inspectors were represented at the top of the transfer list in disproportionate numbers. A. 73-74.

Third, Dr. Mann testified that a comparison of those Level 23 Inspectors who received directed transfers with those who were eligible for directed transfers revealed that those receiving transfers were disproportionately 40 years of age or older. A. 74. Using a different (and, as the District Court held, invalid) statistical method, Dr. Beckett nonetheless reached the same conclusion. A. 74-75.

The Postal Service's contrary statistical evidence is easily summarized. It consisted of Dr. Beckett's testimony that if one compared the percentage of Inspectors transferred who were 40 years of age or older to the percentage of older Inspectors in respondent's total work force (including those who were not eligible for transfer) there was no disparity over time. Dr. Beckett also used an invalid statistical technique. Therefore, petitioners argued, and the District Court found, that his statistical analysis should be accorded little or no weight. The methodology used by Dr. Beckett, and its flaws, are described in detail in the District Court's opinion at A. 68-71. The Court of Appeals did not disturb the District Court's findings as to Dr. Mann's conclusions or the flaws in Dr. Beckett's approach.

The District Court concluded that the senior-first rule violated the ADEA under both disparate treatment and disparate impact analysis. First, the District Court concluded that seniority, like age, is a function of time and that seniority is a proxy for age rather than a neutral factor. The Postal Service admitted that it was well

aware of this relationship when it implemented the senior-first rule. It nevertheless adopted the rule even though it had no legitimate need to transfer the most senior Inspectors and, when given a choice (*i.e.*, when two or more Inspectors volunteered for a single position) did not select the most senior Inspector. These factors convinced the District Court that the Postal Service intentionally transferred its oldest Inspectors to the least desirable assignments, thereby violating the ADEA. A. 81-84.

Alternatively, the District Court, in agreement with every court to consider the issue, held that a violation of the ADEA could be established by a showing of disparate impact.[4] The District Court rejected the Postal Service's defense and thus found that plaintiffs' statistics "proved the obvious—that the senior-first rule, by directing the most senior postal inspectors to the larger and more expensive cities, falls more harshly on [plaintiffs] . . . than on postal inspectors under 40 years of age." A. 72. Finally, the District Court concluded that defendant's own admissions negated the Postal Service's business necessity defense and established that a nondiscriminatory alternative (ranking by random selection) would have met all legitimate needs of the Postal Service. The District Court left the question of damages to a separate proceeding and enjoined respondent from further use of the senior-first rule. A. 87. Respondent appealed pursuant to 28 U.S.C. § 1292(a)(1).

C. The Court of Appeals' Opinion

By a 2-to-1 vote, the Court of Appeals (Buckley, J.) reversed the District Court, concluding that it had "erred by focusing solely on the senior-first rule." A. 9. Instead, the majority thought that the appropriate focus was on "the CPP transfer plan as a whole" (A. 10);

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[4] Because the Court of Appeals decided the case on the ground that no disparate impact existed, it did not address this point.

it rejected the contention that *Connecticut* v. *Teal*, 457 U.S. 440 (1982) precluded such bottom line analysis on the basis that "the senior-first rule was not a freestanding element of an employment program." A. 9-10. Because the percentage of all transferees (both voluntary and involuntary) who were 40 or older was roughly equal to the overall percentage of older Inspectors eligible for transfer, the majority concluded that no disparate impact existed. A. 9. The majority also reversed the District Court's disparate treatment finding, reasoning that "[b]ecause the senior-first rule does not stand alone * * * it is neither fair nor reasonable to judge the motives of the Inspection Service by uncoupling the rule from the other aspects of * * * [the] program." A. 11. From this premise, the majority concluded that the purpose of the CPP, as a whole, was a legitimate one, and the senior-first rule merely "establish[ed] a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." *Id.*

Judge Garth, sitting by designation pursuant to 28 U.S.C. § 294(d), would have affirmed the District Court on the ground that its factual findings—that the senior-first rule had both the purpose and effect of discriminating against older Inspectors—were not clearly erroneous and therefore could not be reversed under Fed. R. Civ. P. 52(a) and *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). A. 21-22. He also concluded that *Teal* required that the senior-first rule be separately examined, and found the majority's attempted distinction of *Teal* "wholly unpersuasive." A. 25-26.

REASONS FOR GRANTING THE WRIT

In reaching the conclusion that an employer does not violate the ADEA by selecting its most senior employees, whom it knows to be its oldest employees, to bear the burden of undesirable and compelled transfers, the court below has overthrown established principles of antidis-

crimination law in both its disparate-impact and disparate-treatment branches. The Court of Appeals' reversal of the District Court's disparate-impact holding because it "focus[ed] solely on the senior-first rule" instead of the employer's transfer policies "as a whole" is directly contrary to *Connecticut* v. *Teal*, 457 U.S. 440 (1982), which holds that a discriminatory method of selection may not be justified merely because the "bottom-line" result is neutral. When it so ruled, the court below did not have the benefit of this Court's recent decision in *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (June 5, 1989). The Court of Appeals' reasoning is diametrically opposed to the holding in that case that a plaintiff *may not* attack the overall result of an employer's policy, but *must* challenge particular practices as discriminatory.

The lower court's rejection of the District Court's disparate treatment finding because the employer's overtly discriminatory classification was not motivated by animus toward older workers is contrary to the fundamental proposition that employers may not lawfully classify workers on the basis of age, race or sex, and that their motive for doing so is irrelevant. Additionally, in finding no animus the lower court impermissibly relied on a justification never proffered by the Postal Service.

By departing so drastically from well-settled principles, the Court of Appeals' decision necessarily conflicts with numerous decisions of other circuits and of this Court. Unless promptly corrected, this decision will create widespread confusion among the lower courts as to the proper application of the ADEA and Title VII. Accordingly, that decision should be reviewed and reversed by this Court.

I. The Lower Court's Disparate Impact Holding Is Directly Contrary to *Teal* and *Wards Cove* and Its Attempted Distinction of *Teal* Creates a Split in the Circuits and Will Cause Widespread Confusion Under the ADEA and Similar Antidiscrimination Laws.

A. The Court of Appeals reversed the District Court's disparate-impact finding on a single ground: "the senior-first rule was not a freestanding element of an employment program." A. 9-10. This holding was without citation to precedent and is contrary to *Teal* and to *Wards Cove*, which followed and elaborated on *Teal*.

As five Courts of Appeals have squarely held,[5] and the Court of Appeals did not dispute, *Teal* applies with equal force in ADEA actions. For the ADEA, like Title VII, "protects individual rather than group rights." *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696, 705-06 n.15 (3d Cir. 1989), *petition for cert. filed*, May 2, 1989 (No. 88-1770) (citing *Teal*). *Compare* 29 U.S.C. § 623(a)(1) (it is unlawful to "discriminate against any *individual* * * * because of such *individual's* age") *with* 42 U.S.C. § 2000e-2(a)(2), quoted in *Teal*, 457 U.S. at 445-46 (unlawful to "deprive any *individual* of employment opportunities * * * because of such *individual's* race, color, religion, sex or national origin") (emphasis added). As this Court recognized in *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), "the [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII."

In *Teal*, this Court examined Connecticut's requirement that all applicants for promotion pass a written

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[5] *Holt* v. *Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984); *Airline Pilots Ass'n* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 953 (2d Cir. 1983), *aff'd in relevant part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985) ("that some [individuals] were successful in complying with the company's discriminatory transfer policy * * * cannot excuse the denial of equal opportunity to other members of the protected class"); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 121-22 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983);

examination to be eligible for further consideration. Because pass rates for blacks were significantly lower than for whites, the examination excluded a disproportionate number of blacks. A group of black employees who had failed the examination sued. Connecticut defended on the ground that, of the employees who had passed the test, more blacks than whites were actually promoted and therefore, the "bottom line" was that blacks were promoted in proportion to their numbers in the work force. Emphasizing that Title VII protects individuals, not groups, from discrimination,[6] the Court held that those black employees who failed the test were discriminated against and that such discrimination was not cured because other blacks were favored by post-test procedures.

In the instant case, petitioners made the showing required by *Teal*, but the Court of Appeals held this proof to be insufficient on the single ground that, "unlike the pass-fail test at issue in *Teal*," the senior-first rule was not a "freestanding" employment practice. A. 9-10. Therefore, petitioners could prevail under disparate im-

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Leftwich v. *Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983) (restriction on the number of tenured professors who would be rehired violates the ADEA even though the average age of the restructured faculty was equal to the average age of the original faculty).

[6] This proposition, which rested primarily on the language of Title VII, was further buttressed by citation to *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978) ("the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force"), *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978) (fairness to women as a group could not justify unfairness to an individual woman), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (a rule barring the hiring of married women with preschool children could not be justified on the ground that eligible women were hired in sufficient numbers that they constituted 75 to 80 percent of all employees).

pact analysis only by demonstrating that the transfer program taken as a whole had a disproportionate impact on older Inspectors. This "freestanding" concept is merely a new formulation of the discredited "bottom line" theory and therefore conflicts with both *Teal* and *Wards Cove*.

Teal precludes an employer from defending a challenge to a single discriminatory step in an employment program by pointing to the bottom-line result produced by that and other steps. Here, neither of the first two steps of the CPP (voluntary transfers and promotions) produced an adverse impact on older Inspectors. The third step (involuntary transfer of the most senior Inspectors) concededly did. Just as the harm to individual black employees who failed the promotion test in *Teal* was not cured because a large number of other blacks were ultimately promoted, the harm to individual, older Inspectors was not cured because a large percentage of the voluntary transferees were relatively younger. The same senior (and hence older) Inspectors would have been transferred against their will even if a larger proportion of the volunteers had been older.[7] In these circumstances, the lower court's insistence that plaintiffs could not separately challenge the adverse effect of the senior-first rule on them is merely another way of saying that one should analyze the ultimate outcome (*i.e.*, "the bottom line") of a selection process, rather than analyzing each element involved. That analysis, however, is exactly what *Teal* disapproved.[8]

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[7] If a greater percentage of voluntary transferees had been senior to petitioners, the only impact would have been that petitioners would have been higher on the seniority list and, consequently, would have been transferred sooner. If a greater percentage were junior, there would have been no impact. Petitioners could have avoided transfer only if the total number of volunteers (of whatever age) were large enough to fill all MMA vacancies.

[8] The same result follows from the language of the ADEA, 29 U.S.C. § 633a(a), which commands that "[*a*]*ll* personnel actions

In *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (June 5, 1989), this Court reaffirmed *Teal* and held that a Title VII plaintiff *must* challenge a specific, identified employment practice as discriminatory. In doing so, this Court rejected the plaintiffs' attempt to build their *prima facie* case from evidence that *on the whole*, an employer's practices had excluded minorities from the workforce:

> Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see *Connecticut* v. *Teal*, 457 U.S., at 450, a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII. [Slip op. at 12-13, emphasis in original.]

Conversely, the Court explained that "even if [the employer] could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, [the employees] would still have a case under Title VII, if they could show that *some particular hiring practice* has a disparate impact on minorities, notwithstanding

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* * * shall be made free from any discrimination based on age." The use of the senior-first rule to direct the transfer of the oldest Inspectors to positions shunned by their fellow employees (since the post had not been filled by volunteers or through promotion) was undeniably a "personnel action." Under the reasoning of the Court of Appeals, however, it was immune from challenge.

the bottom-line racial balance in [the employer's] workforce. See *Teal*, *supra*, at 450 * * *." *Id.* at 9 n.8, emphasis added.

Wards Cove thus reemphasized that both the plaintiff and the defendant must focus on "specific or particular" employment practices. By focusing on the senior-first rule, petitioners proved their case consistent with the law as established by this Court. It was therefore error for the Court of Appeals to hold that petitioners and the District Court should have focused on "the CPP as a whole," and its decision should not be permitted to stand.

B. Not surprisingly, the decision below is also in conflict with the interpretation of *Teal* by other circuits. At least two Courts of Appeals have held that *Teal* requires analysis of the *first step* of an employment program which produces a disparate impact on a protected class. In *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1017 (1983), the First Circuit considered a town's selection process for police officers. The first step of the process excluded all applicants under five feet, six inches in height; later steps considered only women for certain positions. Plaintiff Costa applied for one such "women-only" job, but was rejected because she failed to meet the height requirement. The First Circuit, sitting *en banc*, held that *Teal* requires that "[t]he Court's focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole." 706 F.2d at 4-5.

Likewise, in *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), the Third Circuit held that "*Teal* stands for the proposition that an employment practice must be analyzed at the first step in the employment process that produces an adverse impact on a protected group, not the end result of the employment process as a whole." 706 F.2d

at 122. Quite recently the same court, in *EEOC* v. *Westinghouse*, *supra*, expressly rejected an employer's argument that its denial of severance pay to older employees was justified by the fact that other older workers received early retirement benefits in lieu of severance pay:

> That fact is irrelevant. The ADEA protects individual rather than group rights: it is unlawful for an employer to 'discriminate against any *individual* . . . because of such individual's age.' 29 U.S.C. § 623 (a)(1) (emphasis added). *See also Connecticut* v. *Teal*, 457 U.S. 440, 453-55 . . . Therefore a violation can occur despite the fact that some members of the group were treated as favorably as non-protected employees. [869 F.2d at 705-06 n.15.]

The decision herein directly contravenes these holdings. Under *Massarsky* and *Costa*, the first step of the CPP which produced an adverse effect on older Inspectors was the senior-first rule. Those decisions therefore would require that this rule be the subject of disparate impact scrutiny. Yet the District of Columbia Circuit has here reversed the District Court for conducting the precise analysis which the First and Third Circuits mandate.

C. Certiorari should be granted also because the Court of Appeals has injected a new concept into Title VII analysis—"freestanding"—but has failed to give it content which would enable the courts (and employers and employees) to differentiate between lawful and unlawful employment practices. Although we submit, for the reasons stated above, that it would have been impossible for the Court of Appeals to distinguish the present case from *Teal*, there may well be situations in which criteria for the allocation of benefits or burdens among employees are so closely related that it would be wholly artificial to treat them separately for the purpose of Title VII or ADEA analysis. If so, it is essential that this Court expound a principled basis for determining whether a given selection process may or may not be challenged or defended as a whole. Such characterization takes on additional

significance in light of the holding in *Wards Cove* that a plaintiff not only *may* establish a claim by identifying the specific practice by which he was adversely affected (as in *Teal*), but that he *must* do so. The Court of Appeals, however, provided no definition of "freestanding" practices.

The lower court's only explanation of why the senior-first rule is not "freestanding" was that:

> Under the CPP, every level 23 employee was expected to spend five years in an MMA. Thus, each level 23 employee can fulfill this uniform service requirement through *either* an early voluntary or a later involuntary transfer. [A. 10, emphasis in original.]

On this view, the *involuntary* transfers of the more senior employees could not be treated separately because they were part of a "Policy" which "was expected" to have certain consequences—namely, that each employee would at some point spend five years in a major metropolitan area. But under a disparate impact analysis, which focuses on the actual *effect* on protected employees, a mode of analysis which directs attention to the employer's *expectations* is fundamentally fallacious. Thus, the Postal Service's expectations cannot justify its discriminatory practice in this case. Nor can the Court of Appeals' reliance thereon provide a legitimate basis whereby future courts can differentiate those employment practices which are to be treated as "freestanding" from those which must be treated as integrated. Moreover, even if what the Court of Appeals deemed to have been the Postal Service's "expectations" had conformed to reality,[9] it would be unsound in principle to hold that

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[9] The Court of Appeals did not find that *in fact* all inspectors would ultimately have to spend five years in an MMA; nor could the court properly have so found. First, this Court has instructed: "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709,

the *involuntary* transfer of older senior employees may not be challenged separately because other, junior, employees transfer voluntarily. An involuntary relocation is far more onerous than—and therefore not legally equivalent to—a *voluntary* move early in an employee's career, especially if this voluntary transfer is accompanied by an automatic promotion; see p. 4, *supra*.[10]

The Court of Appeals' approach is unsound in yet another respect. If, notwithstanding *Teal* and *Wards Cove*, a disparate-impact claim by a protected group may

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714 (1986); see also, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982). Second, the uncontroverted evidence precludes such a finding: The District Court found (A.49), and the Court of Appeals acknowledged (A.5), that the CPP contained an elaborate series of exceptions; Inspectors qualifying for those exceptions were not transferred. More significantly, not even all eligible employees were required to serve. Some—those who did not volunteer and were *low enough* in seniority to avoid transfer—were never transferred. The Postal Service's own expert conceded at trial that "*it is simply not true that everyone eligible was going to go*" to an MMA. (Tr. 301-02 (emphasis added)).

[10] The mischief which the Court of Appeals invites may be illustrated by an example. If an employer had one particularly odious task and imposed a universal requirement that each of its 100 employees must perform that task for one month, no one would suggest that it had discriminated unlawfully. If, however, that same employer decreed that its 20 black employees must perform the task first (and therefore none of its white employees would be forced to perform that task for 20 months), virtually everyone would agree that illegal racial discrimination had occurred. The result would not change if the employer first solicited volunteers and, after the list of volunteers was exhausted, assigned the task to blacks first. Nor would the result change if, instead of expressly selecting employees on the basis of race, the employer selected them by reference to a criterion (e.g., predisposition to sickle-cell anemia) that resulted in blacks being selected first. The Court of Appeals' analysis, however, would permit such a system because every employee would be "expected" to eventually perform the odious task, and at the end of 100 months the percentage of blacks assigned the task would be no greater than their overall percentage in the work force. Nothing in the antidiscrimination statutes or this Court's interpretation thereof can sanction such a result.

be rejected because in some (thus far undefined) class of cases the plaintiffs should have focused on the entire policy, that policy itself must be designed so that no disparate impact can occur if it is applied according to its terms. Respondent's Policy fails on this ground as well. If a lesser number of the junior Inspectors had transferred voluntarily, the percentage of Inspectors transferred *involuntarily* would have constituted a greater proportion "of all Inspectors transferred, either voluntarily or involuntarily." A. 9. The Policy would then have had "a disparate impact on the protected class" even under the Court of Appeals' approach. Likewise, if, due to a larger number of unfilled MMA openings, the Postal Service had transferred more Inspectors, these would have had to come from the transfer list; since the most senior employees were at any time at the top of that list, the proportion of senior employees transferred would have been that much greater. Thus, it was a mere fortuity, rather than an inherent characteristic of the Policy, that at the time of suit, the proportion of younger to older transferees matched that of the eligible workforce. Such a policy is not inherently neutral, and cannot provide a defense where its effect is to disadvantage individuals who are protected by the ADEA. And a decision approving such a policy will inevitably sow confusion in suits under the ADEA and other simiiar antidiscrimination statutes.

II. The Court of Appeals' Decision that Petitioners Were Not Subjected to Disparate Treatment in Violation of the ADEA Conflicts with Decisions of This Court and the Courts of Appeals by Introducing a Discriminatory "Animus" Element into Disparate Treatment Analysis and by Accepting a Justification Which the Employer Did Not Articulate.

A. The Court of Appeals' reversal of the District Court's disparate treatment holding requires review because it is contrary to the hitherto unquestioned principle that "facially discriminatory practices are intentional dis-

crimination * * * regardless of the subjective motivation," *Norris* v. *Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982), *aff'd in relevant part*, 463 U.S. 1073 (1983), and because it conflicts directly with the decisions of other circuits that an employer engages in intentional age discrimination when it classifies employees on the basis of a factor that is a proxy for age.

Based on the *admission* of Chief Postal Inspector Clauson that, before he adopted the senior-first rule, he *knew* that the more senior Inspectors were the older Inspectors and therefore he *knew* that the senior-first rule would select the older Inspectors for directed transfer (A. 73-4, 79, 83), the District Court found that seniority was merely a "proxy" for age. Therefore, the Postal Service impermissibly directed transfers "because of age" in violation of the ADEA.[11] A. 81-82. The Court of Appeals did not disturb the District Court's finding that the Postal Service knew that seniority was a proxy for age. It nonetheless rejected the ultimate conclusion that selection on the basis of seniority amounted to intentional age discrimination because it felt that, viewed in the context of the overall transfer program, "the Inspection Service's refusal to substitute a system of random selection for its senior-first rule [was] both rational and devoid of any implication of animus." A. 11. That ruling, which per-

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[11] The District Court's finding—that action based on a factor which the Postal Service knew was a proxy for age violated the ADEA—was consistent with precedent under Title VII. Before the Supreme Court decided *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the courts regularly applied disparate treatment analysis to find violations of Title VII when an employer used criteria which were inherently related to race. *See, e.g., Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (rule prohibiting transfer between units where the employer's work force had traditionally been segregated into units by race); *Local 53, Int'l Ass'n of Heat & Frost Insulators* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (all-white union which restricted new membership to sons and close relatives of present members). *See also*, cases cited at p. 22, *infra*, for similar decisions under the ADEA.

mits personnel decisions to be made on the basis of age just as long as they are not irrational and are not the result of animus toward older workers, is contrary to the words of the statute and to elementary principles governing employment discrimination law. Unless promptly corrected, this innovation will invite inappropriate and wasteful litigation about employers' subjective motivations.

The ADEA does not require proof of animus or ill-will toward older workers to establish intentional discrimination. Rather, it prohibits personnel actions taken "*because* of [an] individual's age." 29 U.S.C. § 623(a)(1). Given the language of the ADEA, which is virtually identical to the language of Title VII, *supra* at 11, no court has previously suggested that it is permissible to classify workers on the basis of age, race or gender so long as that classification is not motivated by animus to the protected group. Indeed, this Court's decisions establish the opposite: "Congress has decided that classifications based on sex, like those based on national original or race, are unlawful." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978). *Accord*, *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1084 (1983) ("We continue to believe that 'a statute that was designed to make race irrelevant in the employment market' could not reasonably be construed to permit such a racial classification") (citation omitted). The lower court's focus on animus is also irreconcilable with the tripartite evidentiary scheme articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under *Green* and its progeny, the plaintiff is not required to prove that the employer had acted with animus against him or the protected group, and it is no defense for the employer that he acted without such animus. Thus where, as here, "there is direct evidence that the method of transfer * * * depends upon [a plaintiff's] age," no more is required to establish a violation. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111,

121 (1985). In requiring more, the lower court excused conduct which was illegal under long-established principles.

Additionally, the Court of Appeals' departure from the general understanding of what constitutes disparate treatment inevitably created a conflict with numerous decisions of other circuits. Precisely in point are the decisions of three other circuits which have held that, regardless of an employer's motive, it may not classify employees on the basis of a factor that is a proxy for age. *EEOC* v. *Westinghouse*, *supra*, 869 F.2d at 706 (employer may not deny severance benefits to employees eligible for retirement where eligibility for retirement correlates closely with age); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (same); *Dace* v. *ACF Indus., Inc.*, 722 F.2d 374, 378 (8th Cir. 1983) (disparate treatment case holding that "discrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees is improper under the ADEA").

B. The Court of Appeals' disparate treatment holding constitutes a fundamental departure from accepted principles in two other respects. The Court of Appeals suggests that the Postal Service's decision to select its oldest Inspectors for involuntary transfer can be excused because that rule was necessary "to establish a rational and orderly system to ensure that all level 23 Inspectors serve a tour of duty in an MMA prior to retirement." A. 11. As the above discussion illustrates, however, *overt* discrimination can never be justified on the ground that it was necessary to achieve an employer's business goals.[12]

Moreover, that justification was never offered by the Postal Service, but was articulated for the first time by

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[12] The sole exception to this rule is the bona fide occupational qualification defense of 29 U.S.C. § 623(f)(1). Neither the Postal Service nor the Court of Appeals relied on that exception.

the panel majority.[13] This Court's precedent establishes that such judicial advocacy is improper. *See, e.g., Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981) ("the *defendant* must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection" (emphasis added)). *See also Wards Cove*, slip op. at 15-16 (employer bears burden of production for business justification in disparate impact case; this "conforms to the rule in disparate-treatment cases" that employer must assert "a legitimate neutral consideration" that accounts for employment decision). This carefully crafted and principled allocation of burdens would fall into complete disarray if courts could sustain an employer's action on the basis of a justification never mentioned by the employer.

---

[13] The Postal Service's asserted justifications for the senior-first rule in the District Court and the Court of Appeals were (1) it needed the most experienced Inspectors in MMAs, (2) it needed a perpetual system and (3) it needed a selection factor that was predictable in the sense that it let employees know where they stood on the transfer list. A. 17, 76. The first reason is clearly pretextual because, under the CPP, the preferred method of filling MMA vacancies is by voluntary transfer of any Inspector and, when given a choice between volunteers, the Postal Service selected the one who applied first, *not* the most experienced. A. 48-50, 76-77. Likewise, the District Court found that the Postal Service's need was for "level 21 or level 23 postal inspectors *of any seniority*" (emphasis in original). A. 77. And, predictability and perpetuity could be ensured merely by maintaining a permanent transfer list, with Inspectors chosen for transfer by random selection.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted. The case should be set for briefing and argument or alternatively remanded for reconsideration in light of *Wards Cove Packing Co.* v. *Atonio.*

Respectfully submitted,

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FILED
JUN 30 1989

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

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CLYDE J. ARNOLD, JR., *et al.*,
Petitioners,

v.

POSTMASTER GENERAL,
Respondent.

———

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 17, 1988 Decided December 20, 1988

No. 87-5361

CLYDE J. ARNOLD, JR., et al.

v.

UNITED STATES POSTAL SERVICE,
Appellant

No. 87-5362

CHARLES RAY NETHERTON, as class agent

v.

UNITED STATES POSTAL SERVICE,
Appellant

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 85-2571 & 86-2291)

Wilma A. Lewis, Assistant U.S. Attorney, with whom *William Bradford Reynolds*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *Stephen E. Alpern*, Associate General Counsel, U.S. Postal Service,

John D. Bates, and *R. Craig Lawrence*, Assistant U.S. Attorneys, and *Anthony W. DuComb*, Attorney, U.S. Postal Service, were on the brief, for appellant.

Joseph E. Kolick, Jr., with whom *Cyril V. Smith* and *Clay Warner* were on the brief, for appellees.

Before BUCKLEY and D.H. GINSBURG, *Circuit Judges*, and LEONARD I. GARTH,* *U.S. Senior Circuit Judge* for the Third Circuit.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

Dissenting opinion filed by *Senior Circuit Judge* GARTH.

BUCKLEY, *Circuit Judge*: The United States Postal Inspection Service appeals from a decision of the district court holding that it discriminated against a class of older postal inspectors in violation of the Age Discrimination in Employment Act. The district court ruled that a single element of the Postal Service's Career Path Policy constituted illegal age discrimination by mandating that the most senior postal inspectors transfer to any of fourteen chronically understaffed offices across the country. *Arnold v. Postmaster General*, 667 F. Supp. 6 (D.D.C. 1987). We reverse.

I. BACKGROUND

A. *Legal Framework*

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1982) ("ADEA"), "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). Specifically, it provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any in-

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

> dividual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a) (1982).

In applying the terms of the statute to particular cases, courts have drawn upon Supreme Court decisions detailing the twin methods of proof in race or gender discrimination cases under Title VII of the Civil Rights Act of 1964. Under traditional Title VII analysis, a plaintiff may establish that he was the victim of *disparate treatment* by introducing sufficient evidence to establish a prima facie case of discrimination. The defendant must then come forward and articulate some legitimate, nondiscriminatory reason for his actions. Provided the defendant does so, the plaintiff must establish that the defendant's proffered reason is a mere pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Throughout the entire process, the burden of persuasion remains with the plaintiff and proof of discriminatory intent is critical. *Burdine*, 450 U.S. at 248.

Alternatively, a Title VII plaintiff may recover by establishing that a particular employment practice, while neutral on its face, has a *disparate impact* on the protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (Title VII directed to "*consequences* of employment practices, not simply the motivation") (emphasis original). Proof of discriminatory intent is not necessary to prevail on a disparate impact claim. The plaintiff must simply establish, generally through the use

of statistical evidence, that the challenged practice has a disparate impact on the protected class. Once this is accomplished, the burden shifts to the defendant to supply evidence that the practice is a "business necessity." *Id.* at 432. The plaintiff may still prevail if he can prove that a non-discriminatory alternative was available.

In *Johnson v. Lehman*, 679 F.2d 918, 921-22 (D.C. Cir. 1982), one of our early forays into ADEA litigation, we expressly held that the disparate treatment mode of analysis is applicable to an age discrimination claim under ADEA. *See also Stacey v. Allied Stores Corp.*, 768 F.2d 402, 407 (D.C. Cir. 1985). We have never determined whether a plaintiff bringing suit under ADEA may prevail on a disparate impact theory.

B. *The Career Path Policy*

The United States Postal Inspection Service employs more than 1,900 postal inspectors across the United States. As the law enforcement branch of the service, it is responsible for "investigat[ing] offenses and civil matters relating to the Postal Service." 39 U.S.C. § 404 (a)(7) (1982). The Postal Inspection Service is directed by the Chief Postal Inspector, who in turn reports to the Postmaster General.

In response to a shortage of experienced postal inspectors in fourteen major metropolitan areas ("MMAs"), the Postal Inspection Service instituted the Career Path Policy ("CPP") on December 1, 1980. Appendix for Appellant ("App.") at 82-82. The goal of the policy was to ensure that these areas would be staffed by a constant supply of experienced postal inspectors, and "to guide inspectors along a career path which provides them experience and exposure." *Id.* at 88.

Generally, postal inspectors are categorized according to certain experience levels, ranging from level 17 to level

24. Postal inspectors ordinarily spend one year as a level 17 inspector, one year at level 19, and two years at level 21 before being promoted to level 23. By the time they reach level 23, postal inspectors will have had experience in each of the four basic investigation areas. Level 24 inspectors are Team Leaders, who supervise groups of inspectors from each of the other service levels. The Inspection Service is authorized by statute to transfer any postal inspector, from any level, at any time. 39 U.S.C. § 1001(e)(2) (1982).

The Career Path Policy was established as a complement to this basic framework. A central objective of the CPP, made explicit in 1984, is to ensure that all level 23 inspectors spend five years in an MMA during the course of their service. App. at 88 ("It is Inspection Service policy that normally all Inspectors will serve at least 5 years in a major metropolitan area as a Level 23/24.").

The CPP establishes three methods for achieving that objective. First, level 23 postal inspectors are encouraged to apply for lateral reassignments to vacancies in an MMA. If more than one level 23 postal inspector bid for a given vacancy, the first to bid is awarded the assignment. Second, if a vacancy is not filled by a voluntary level 23 lateral assignment, the Postal Service advertises the vacancy among level 21 postal inspectors, who may volunteer for lateral reassignment as level 23 inspectors. Finally, if the vacancy is not filled through either of the first two methods, the Postal Inspection Service will refer to a list of current level 23 inspectors and choose the most senior, in terms of service, for mandatory reassignment. Certain postal inspectors are expressly exempted from this final category, including those eligible to retire within five years, those who relocated within the past two years, and those who already served for two years in an MMA. After five years in an MMA, any inspector may ask to be reassigned.

C. *The Suit*

In September 1982, two years after the CPP was first unveiled, a postal inspector named Charles Netherton filed a class action on behalf of himself and other similarly situated inspectors in the United States District Court for the Middle District of Florida. *See generally Arnold v. Postmaster General*, 667 F. Supp. 6, 12-13 (D.D.C. 1987) ("*Arnold II*") (outlining procedural history). Netherton claimed that the CPP's provision for the directed transfer of senior postal inspectors had a disparate impact on inspectors aged forty and over in violation of the ADEA.

In August 1985, two additional groups of postal inspectors filed suit in the District of Columbia. The cases were consolidated on September 16, 1986, after the *Netherton* suit had been transferred to the District of Columbia. In December 1986, the United States District Court for the District of Columbia held that the plaintiff class could proceed under a theory of disparate treatment as well as disparate impact and denied cross-motions for summary judgment. *Arnold v. United States Postal Service*, 649 F. Supp. 676 (D.D.C. 1986) ("*Arnold I*"). Finally, by separate order, the district court granted the Inspection Service's motion to bifurcate the trial into separate liability and damages phases.

Following a three-day bench trial, the court issued its opinion in favor of the postal inspectors. First, the district court held that the third aspect of the CPP—which it termed the "senior-first rule"—had a disparate impact on level 23 employees over the age of forty. *Arnold II*, 667 F. Supp. at 19-26. It accepted appellees' statistical proof that the senior-first rule "falls more harshly" on this protected class. *Id.* at 19. After making this initial finding, the court concluded that appellant had failed to demonstrate that the discriminatory rule could be justified as a business necessity because it "failed to carry its burden of persuading the Court that it had *no other choice* but

to transfer the senior and older postal inspectors . . . ." *Id.* at 24 (emphasis original). Finally, the court concluded that even if the defendant had a business necessity to transfer the most senior level 23 inspectors, it could have accomplished this purpose without discriminating against older employees by using a random transfer system. *Id.* at 25-26.

Having concluded that the senior-first rule had a disparate impact on older postal inspectors, the court further found that the Postal Service knew of the correlation between age and seniority, and had therefore intentionally discriminated against level 23 postal inspectors over the age of forty. *Id.* at 26-28. Specifically, the court held that: (1) appellees' statistical proof and anecdotal evidence raised "far more than an inference of age discrimination," *id.* at 27; (2) the Postal Inspection Service did not sustain its burden of producing evidence of a legitimate non-discriminatory reason for the senior-first rule; and (3) any non-discriminatory reason could only have been a pretext for age discrimination because the Postal Inspection Service could instead have used a random transfer system.

Leaving the question of damages to a separate proceeding, the district court enjoined appellant from further reliance on the senior-first aspect of the CPP. *Id.* at 29.

II. Discussion

A. *Disparate Impact*

1. *Disparate Impact Under the ADEA*

In *Griggs*, 401 U.S. at 430, the Supreme Court first held that a Title VII plaintiff can establish race discrimination by demonstrating that a neutral employment practice had a disparate racial impact. Although the Court "has never held that proof of discriminatory impact can establish a violation of the ADEA," *Markham v. Geller*,

451 U.S. 945, 948 (1981) (Rehnquist, J., dissenting from the denial of certiorari), the district court followed the lead of a number of our sister circuits and held that the disparate impact theory is applicable to this case. *See, e.g., EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). *Cf. Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216-22 (7th Cir. 1987) (Easterbrook, J., dissenting).

We do not decide whether the test is applicable to ADEA cases because we conclude that the CPP does not have a disparate impact on postal inspectors who are forty years of age and older.

2. *Impact of the CPP on Older Inspectors*

The central element of the district court's disparate impact holding was its decision to focus solely on the "senior-first" aspect of the CPP, and to exclude from consideration those postal inspectors who were transferred under the two complementary aspects of the program. The court explained:

> Plaintiffs, however, have made it clear since this lawsuit was filed that they challenge the discriminatory senior-first rule of the Career Path Policy. It is defendant who has tried to mischaracterize plaintiffs' challenge to encompass the entire Career Path Policy in order to dilute the adverse impact that the senior-first rule has on plaintiffs. Plaintiffs have never challenged the aspects of the Policy permitting postal inspectors to volunteer for lateral reassignment.

Arnold II, 667 F. Supp. at 19-20 (citations omitted).

By so limiting the scope of its scrutiny, the district court effectively determined the outcome of the case. Appellant does not dispute the district court's finding

that the senior-first transfer rule, considered alone, had a disproportionate impact on individuals over forty. Instead, appellant argues that the impact of the CPP must be viewed in all its facets, including the voluntary transfer provisions. Considered in this light, appellant contends that the CPP did not have a disparate impact on the protected class. According to statistics presented by appellant's expert, inspectors aged forty and above constituted 34.4 percent of all level 23 inspectors eligible for transfer into an MMA, and constituted 33.8 percent of all inspectors actually transferred, either voluntarily or involuntarily. App. at 101, 113. These statistics illustrate the distortions that will result if an analysis of the CPP's impact is limited to just one of its elements.

Appellees argue that the narrow focus adopted by the district court is mandated by *Connecticut v. Teal*, 457 U.S. 440 (1982). That case involved a Connecticut state agency's requirement that candidates for the position of Welfare Eligibility Supervisor pass a written examination that was not shown to be job related. The Court held that because a disproportionate number of blacks had failed the test, it could not be used even though more than a proportionate number of blacks had actually been promoted to that position as a result of the agency's application of an affirmative action program. The Court wrote that such a focus on "the bottom line" is improper because Title VII protects individual employees. *Id.* at 455. The employer could not use the non-discriminatory later stages of the promotion process to temper the effects of the written examination at the first stage, because those who failed the examination never received consideration at the later stages.

We think that *Teal* is inapposite, and we agree with appellant that the district court erred by focusing solely on the senior-first rule. The central distinction between *Teal* and the current case is that, unlike the pass-fail test at issue in *Teal*, the senior-first rule was not a free-

standing element of an employment program. Under the CPP, every level 23 employee was expected to spend five years in an MMA. Thus each level 23 employee can fulfill this uniform service requirement through *either* an early voluntary or a later involuntary transfer. Those individuals who are subject to involuntary transfers, and protected by the ADEA, were not excluded from the voluntary transfer stage. While the impact of an unfair test on the individual plaintiffs in *Teal* has nothing to do with the fact that other blacks were ultimately promoted, the impact of the CPP on senior postal inspectors can be fairly measured only by taking into account those who, subject to an identical obligation, elected to fulfill their responsibility by volunteering for transfer. Our decision to view the CPP transfer plan as a whole does not involve using the non-discriminatory effects of voluntary transfers to answer the complaint of one who did not have the opportunity to undertake such a transfer. Rather it reflects a realistic assessment of the transfer options available alike to each and every level 23 employee.

Because the district court failed to consider the impact of the senior-first transfer rule within the context of the CPP as a whole, its finding that that rule had a disparate impact on older employees is legally irrelevant. This is so because the court based its factual finding on an erroneous understanding of the perspective appropriate to a disparate impact analysis in this case, assuming such an analysis is applicable to ADEA cases. Thus notwithstanding the court's contrary finding, we conclude that appellees failed to establish that the CPP, taken as a whole, had a disparate impact on older postal inspectors.

B. *Disparate Treatment*

Noting that we have previously held that a plaintiff may establish a prima facie case of discrimination with statistics alone, *see Palmer v. Schultz*, 815 F.2d 84, 90

(D.C. Cir. 1987), the district court relied on its statistical analysis of the senior-first rule to establish the requisite inference of age discrimination under a disparate treatment analysis. *Arnold II*, 667 F. Supp. at 27.

The district court then found that appellant had not only failed to proffer a non-discriminatory reason for the senior-firt rule, but that the rule was "a pretext to mask its discriminatory animus and motive." *Id.* at 27-28. In so finding, the court relied primarily on anecdotal evidence that appellant was aware of the correlation between age and seniority and had rejected a system of random selection as an alternative even though it had been advised that the senior-first rule might be found in violation of the ADEA.

We disagree. There may well be cases in which seniority is simply a code word for age discrimination. Because the senior-first rule does not stand alone, however, it is neither fair nor reasonable to judge the motives of the Inspection Service by uncoupling the rule from the other aspects of what was clearly intended to be an integrated program. We emphasize again: The CPP established that all eligible level 23 inspectors, young or old, should expect to serve five years in an MMA. Viewed in this context, the purpose of the senior-first rule was not to require that the oldest postal inspectors be transferred, but to establish a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement.

In this context, we find the Inspection Service's refusal to substitute a system of random selection for its senior-first rule to be both rational and devoid of any implication of animus. Reliance on a lottery would have reduced incentives for voluntary transfers by encouraging chance-takers to gamble on the possibility that they could reach retirement without ever having contributed the five years of MMA service expected of all level 23 inspectors. We

reject the district court's conclusion that the refusal or the lottery alternative proves a discriminatory intent, 667 F. Supp. at 28, because based, as it is, on an incorrect legal premise, it is clearly erroneous. The implications of the employer's awareness of the senior-first plan's effects can only be assessed within the context of the larger, comprehensive program of which it is an integral part.

Viewed from this perspective, and applying the three-pronged analytical framework that governs our disposition of disparate treatment cases, we conclude that appellees failed to establish a violation of the ADEA. First, the evidence supplied by appellees did not establish a prima facie case of discrimination. While we have held that statistical proof may be sufficient to establish discriminatory intent, this is only true where the statistics focus on the appropriate labor pool. *Palmer*, 815 F.2d at 91 n.6. Second, appellant provided ample evidence of the non-discriminatory reasons that led to the design of the three elements of the CPP. The district court erred in concluding that appellant had failed to rebut the inference of discrimination because of its focus on only the third of those elements. Finally, appellees did not successfully establish that, in this case, appellant's reliance on seniority as a method of selection was simply a pretext for age discrimination. While the appellant apparently realized that the senior-first rule would result in the mandatory transfer of older employees, it relied on the rule as an appropriate mechanism for enforcing an obligation that was both universal and neutral.

III. Conclusion

Appellees failed to establish that the Postal Inspection Service discriminated against older postal inspectors in violation of the ADEA. Accordingly, the judgment of the district court is

Reversed.

GARTH, *Circuit Judge, dissenting*: I do not agree with the majority of this court that the Career Path Policy of the United States Postal Service can be upheld in the face of the principles, spirit and letter of the Age Discrimination in Employment Act. My disagreement is based on two fundamental grounds: first, is the majority's failure to defer to the district court's findings of fact, all of which are supported by evidence, and none of which can be said to leave us with the "definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985). Second, is the constricted and anomalous interpretation given the ADEA by the majority which holds that even though one component of the Postal Service's policy violates the ADEA, that when combined with the other two components that do not, the flawed component is somehow cured.

Because I am convinced that the majority has erred in both these respects, I respectfully dissent.

I.

The Age Discrimination in Employment Act makes it unlawful for an employer to discriminate against any employee with respect to the employee's "conditions . . . of employment, because of such individual's age; . . . ." 29 U.S.C. § 623(a). With regard to federal government employment, and in particular with regard to those employed in the United States Postal Service, the Act provides that "[a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . in the United States Postal Service . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633(a). Accordingly, if without statutory justification, the Postal Service imposes an onerous condition on those of its employees in the protected age group, 40 years old or over, and that condition is harsher than the condition imposed

on younger (less than 40 years of age) employees, the condition cannot be sustained without violating the Act.

In the present appeal, the United States Postal Services Career Path Policy ("CPP") has been challenged by Level 23 postal inspectors over the age of 40, precisely because a condition of the Career Path Policy requires senior inspectors to accept undesirable, expensive and disadvantageous involuntary transfers to Major Metropolitan Areas ("MMAs"), solely because of their seniority, which the district court correlated to their age.[1] The CPP, while permitting *voluntary* Levels 21 and 23 lateral reassignments without regard to seniority, at the same time mandates that the most senior Level 23 inspectors in the country are obliged to accept *involuntary* directed transfers to Major Metropolitan Areas if the needs of the Service have not been met by the voluntary transfers. These involuntary transfers are made on a "senior-first" basis and are made to locations which are regarded as extremely undesirable because of the high cost of living in those areas. Thus, because of the correlation between age and seniority, by reason of age only, the over-40 inspectors are penalized by transfers not required of their under-40 colleagues.

The district court found that this "senior-first" rule violated the Act under both disparate impact and disparate treatment theories. It found that the postal inspectors' age and seniority were correlated; that the Postal Service knew of that correlation; and that there was no justifiable business necessity for such a policy. The district court also found that the evidence clearly demonstrated that the real business need of the Postal Service, in order to alleviate the shortage of experienced postal inspectors in major metropolitan areas, was not

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[1] The clear correlation between age and seniority found to exist by the district court is binding upon us. No contention has been made that the district court's finding was clearly erroneous. *See Arnold v. Postmaster General*, 667 F. Supp. 6. 27 (D.D.C. 1987).

for senior Level 23 inspectors but rather was for ". . . Level 21 or higher postal inspectors of *any seniority*." 667 F. Supp. 6, 19 (D.D.C. 1987). Accordingly, the district court found that the Postal Service's purported reason for the "senior-first" rule was pretextual and that the "senior-first" rule, by falling more harshly on postal inspectors over the age of 40, was discriminatory in its operation. Indeed, the district court found that the Postal Service intentionally subjected senior Level 23 inspectors to disparate treatment and did so knowingly, and therefore, willfully. Moreover, the record discloses that the findings made by the district court are supported by evidence and thus are not clearly erroneous.

Because we must defer to the district court's findings in our role as an appellate tribunal and because the record clearly demonstrates that the senior inspectors of protected age are adversely affected and adversely treated under the Postal Service Career Path Policy because of their age, I would affirm the district court's order in all particulars.

II.

The essential flaw in the Postal Service Career Path Policy can best be illustrated by the following example which the government admitted during oral agreement, accurately reflects the manner in which the Career Path Policy operates:

Let us assume hypothetically that there are 7 vacancies to be filled in MMAs through the use of the CPP. Assume further that there are 10 Level 23 postal inspectors available to fill those positions: 4 of these inspectors are over the age of 40, and 6 are under the age of 40. If 4 of the under-40 inspectors voluntarily transfer to fill 4 of the MMA vacancies under the voluntary transfer component of the CPP, there would still be 3 vacancies remaining. These 3 vacancies, under the challenged provision of the CPP, would have to be involuntarily filled by directed transfers from the remaining 4 senior in-

spectors who are over the age of 40. Under the present CPP, the 3 vacancies would automatically be filled by the directed involuntary transfer of 3 of the 4 remaining senior Level 23 over-40 inspectors.

Because the CPP operates in precisely this manner—a manner that patently discriminates against inspectors in the protected age group—it is clear beyond peradventure that the implementation of the CPP by the Postal Service violates the ADEA. Neither the explanations offered by the Service nor the justification proffered by the majority can alter the stark reality of the policy's operation: If an inspector is over 40, he will suffer the disadvantage of an adverse and undesirable posting not otherwise imposed upon any younger colleague.

A.

Here Arnold has argued that the Postal Service's CPP discriminates against senior (and thus older) Level 23 postal inspectors by requiring these older inspectors to involuntarily transfer to MMAs, rather than being randomly assigned to MMAs without regard to their seniority--ergo age. Arnold advanced two theories of discrimination. Arnold first claimed that the "senior-first" rule has a *disparate impact* on the class of Level 23 inspectors who are over the age of 40 and thus are protected by the ADEA. The district court agreed, finding that the "[p]laintiffs' statistics establish that the adverse effects of the senior-first rule, which involuntarily transfers the oldest postal inspectors to cities with high costs of living, or causes them to resign or volunteer for lateral transfer, falls more harshly on postal inspectors 40 years of age and older than on postal inspectors under 40 years of age." 667 F. Supp. at 18-19.

Arnold also has contended that the senior-first rule constitutes *disparate treatment* of the senior Level 23 inspectors because the Postal Service *knew* the correlation

between age and seniority but nevertheless implemented the use of the rule, thus intentionally discriminating against the older inspectors on the basis of their age by forcing them to transfer to cities to which they did not wish to transfer. The district court also found in favor of Arnold on this theory, finding that the "[d]efendant was unable to proffer a legitimate, nondiscriminatory reason for using the senior-first rule because no such reason exists." *Id* at 19.

B.

On appeal, the Postal Service attacked the district court's conclusions on four fronts. First, it argued that the district court erred in applying disparate impact analysis—typically applied under Title VII—to an ADEA case. Second, the Postal Service argued that, even if disparate impact analysis is appropriate in an ADEA context, the district court erred in finding that the directed involuntary transfer under the CPP had a disparate impact in the instant case. Third, the Postal Service argued that the "senior-first" rule is job-rleated and thus falls within the business necessity exception to the ADEA. And finally, the Postal Service challenged the district court's finding of *disparate treatment* on the ground that the district court applied the wrong legal standard in reaching its conclusion.

C.

Although the majority discusses the applicability of the *disparate impact* theory to ADEA cases, it ultimately reaches no conclusion on this issue. The majority apparently rejects the district court's factual finding that the CPP had a disparate impact on older postal inspectors. It does so, however, without reviewing the district court's finding under our clearly erroneous standard of review.

With respect to *disparate treatment*, the majority rejects as "clearly erroneous" the district court's finding

that the "senior-first" policy amounted to disparate treatment of older postal inspectors. As with disparate impact, the majority reaches this conclusion because it ignores the impact of the "senior-first" rule of mandatory transfer. Rather, the majority argues that the appropriate analysis must include the voluntary transfers permitted under the CPP.

D.

As I have indicated, my disagreement with the majority is manifold. First, unlike the majority, I believe that this case requires us to address the application of the disparate impact theory to ADEA cases. I would hold that in this respect there is no meaningful distinction between Title VII and the ADEA and that the disparate impact theory should be available to ADEA plaintiffs. Secondly, I believe that the majority has reversed the district court's finding of disparate impact without reference to either the appropriate standard of review or to the considerable evidence in the record supporting the district court's finding. Lastly, I believe that without analyzing the extensive record, and without deferring to the district court's findings of fact supported by evidence, the majority has improperly substituted its personal judgment for the district court's findings. I turn first, therefore, to a consideration of Arnold's disparate impact theory.

III.

A.

The Postal Service has argued that disparate impact analysis is not available in cases arising under the ADEA, I can discern no compelling argument why it should not. That the ADEA's coverage and provisions are substantially similar to the provisions of Title VII is no accident. The similarity between these two statutes flows from the fact that the ADEA was modeled after Title VII, relying on much of Title VII's actual language

for its content. *See Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

Under Title VII, employees can prove discrimination by showing either disparate impact *or* disparate treatment. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Because of the similarity between Title VII and the ADEA, many ADEA cases within and without this Circuit have utilized the "tripartite evidentiary scheme developed in the context of Title VII litigation," *Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985), in disparate treatment cases arising in the ADEA context. *See also*; *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1015 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60-61 (10th Cir. 1979). Similarly, many Courts of Appeals now allow employees to establish a violation of the ADEA by demonstrating disparate impact alone. *See e.g. Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3d Cir. 1987); *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). Two of this court's ADEA opinions have made reference to disparate impact analysis, although neither directly addressed the question of whether that analysis should be employed in ADEA cases. *See Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel*, 748 F.2d at 709.

As I have indicated, there is no reason why disparate impact theory should not be available for those seeking relief under the ADEA. The similarity between Title VII and the ADEA, along with the ADEA's history, argue in favor of such importation. In *Lorillard*, 434 U.S. at 584, the Supreme Court observed that "the [substantive] provisions of the ADEA were derived *in haec verba* from Title VII." Moreover, in *Griggs*, 401 U.S. at 429, the

Court explained that Congress's objective in enacting Title VII was "plain from the language of the statute" and, on the basis of that language, held that Title VII "proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Id.* at 431. *See also Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2785-86 (1988) (Facially neutral employment practices that have significant adverse effects on protected *groups* may violate Title VII without proof of discriminatory intent).

Given that the text of the ADEA was derived largely from that of Title VII, and given that the Supreme Court's acceptance of disparate impact theory was based on Title VII's express language, it would be anomalous to conclude that disparate impact analysis should not be followed in proving an ADEA violation. Indeed, no Court of Appeals that has been faced with this question has decided it differently.

Moreover, Title VII, by its terms, is designed to protect against discrimination based on an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. Each of these categories shares a single distinctive feature: each is a facet of human existence with which a person is born, and which is largely beyond his or her control. Thus, under Title VII, Congress has decreed that certain adverse employment decisions made by employers based on an individual's possession of any of these characteristics, is repugnant and illegal. In enacting the ADEA, Congress has also decreed that employment decisions based on *age*, (an equally immutable characteristic), are similarly repugnant and illegal.

Because I am satisfied that in this context, there is no distinction between Title VII and the ADEA, I conclude that the district court did not err when it stated that "a violation of the ADEA may be proved by showing that an employment practice, such as the senior-first rule, which is involved in this case, has a disparate impact on

a protected class, namely postal inspectors 40 years of age and above." 667 F. Supp. at 19.

Having concluded that the district court did not err in applying the theory of disparate impact in this case. I consider next the appropriate standard of review for the district court's finding that the "senior-first" component of the CPP did in fact have a disparate impact on the most senior Level 23 inspectors. The record contains evidence that support the district court's finding of disparate impact—a finding to which we must defer unless clearly erroneous.

In discussing this question, the majority fails to articulate any standard of review. Yet, the case law makes clear that findings of disparate impact and disparate treatment are reviewed under a clearly erroneous standard. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985) (disparate treatment); *Palmer v. Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) (disparate treatment); *Kilgo v. Bowman Trans., Inc.*, 789 F.2d 859, 872-73 (11th Cir. 1986) (disparate impact); *Griffin v. City of Omaha*, 785 F.2d 620, 625 n.6 (8th Cir. 1986) (disparate treatment); *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 141, 142-43 (1st Cir. 1985) (disparate impact), *cert. denied*, 476 U.S. 1172 (1986); *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 569 n.14 (4th Cir. 1985) (disparate impact); *Smith v. Western Electric Co., Inc.*, 770 F.2d 520, 524 (5th Cir. 1985) (disparate impact and disparate treatment).

In *Anderson* the Supreme Court defined "clearly erroneous" as follows:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, . . . is that "[a] finding is 'clearly erroneous' when although there is evidence to sup-

> port it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of the fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United Sttaes v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

Anderson, 470 U.S. at 573-74.

The district court's "account of the evidence" in this case, was at the very least "plausible". The majority, by ignoring the prescribed standard of review has performed precisely the type of *de novo* review forbidden by the Supreme Court in *Anderson*.

C.

In order to establish a *prima facie* case of age discrimination on the basis of a facially neutral employment policy's disparate impact, a plaintiff is not required to

demonstrate that the policy is the result of an employer's discriminatory intent, but need only establish that the policy impacts disproportionately on persons protected by the ADEA. *Leftwich v. Harris-Stowe State College*, 702 F.2d at 690; *Geller v. Markham*, 635 F.2d at 1032. *See also Griggs v. Duke Power Co.*, 401 U.S. at 431-32.

Here, the district court found that the CPP had a disproportionate impact on the most senior Level 23 inspectors because its "senior-first" rule was in essence an "older-first" rule, and subjected the older postal inspectors to directed transfers first." 667 F. Supp. at 23. The district court reached this conclusion on the basis of the statistical evidence offered into evidence by Arnold. This evidence, which constituted an appropriate way of proving disparate impact, *see e.g. Hazelwood School Dist. v. United States*, 433 U.S. 299, 306-309 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340 (1977); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3d Cir. 1987); *Palmer v. Schultz*, 815 F.2d 84, 91 n.6 (D.C. Cir. 1987); *Leftwich v. Harris-Stowe State College*, 702 F.2d at 690, overwhelmingly demonstrated that a disproportionately large number of the Level 23 inspectors over the age of forty were forced, against their wills, to move to the more expensive MMAs. On the basis of this statistical evidence, the district court found that "the senior-first rule fell more harshly on plaintiffs [over the age of 40] than on postal inspectors under the age of 40 . . ." The district court then concluded that this factual finding supported the conclusion that the "senior-first" rule violated the ADEA. 667 F. Supp. at 23.

As illustrated by the hypothetical example set forth at the outset of this dissent in Part II, no other conclusion can logically be reached. If the "senior-first" rule violates the ADEA and therefore is tainted, its taint cannot be sanitized by the remaining innocuous provisions of the Postal Service policy. Indeed, nowhere in the major-

ity opinion is it ever suggested that the "senior-first" rule by itself does not violate the ADEA. Nor is it an answer to the district court's finding of illegality, that Arnold has focused on only one provision of the three-part CPP as the majority argues.

D.

I am not convinced by the Postal Service's contention, accepted by the majority, that disparate impact may not be established by isolating one component of the CPP, rather than considering its overall effect on the protected class of Level 23 inspectors. The gravamen of the majority's position is that the district court erred in rejecting Postal Service's statistical evidence as to the effect of the CPP with respect to *all* postal inspectors (both above and below the age of 40), in favor of Arnold's proofs which focused on the effect of the "senior-first" rule on Level 23 inspectors over the age of 40. The majority claims that, when viewed in terms of its three component parts—(1) voluntary transfers of Level 23 inspectors; (2) voluntary transfers of Level 21 inspectors who are promoted to fill Level 23 vacancies; and (3) senior-first directed transfers—the CPP does not impact unfavorably on older Level 23 inspectors. In so concluding, the majority reasons that when one examines the pool of all Level 23 postal inspectors who have been transferred, both voluntarily and involuntarily, there is no disproportionate representation of inspectors aged 40 and older.

I believe that the majority has missed the point of Arnold's complaint. No objection has ever been lodged against the policy component of *voluntary transfers*. Arnold's only complaint is with the *involuntary transfers*. When the district court examined the pool of inspectors, who had been subject to *involuntary transfers*, it found that it was "1.9 to 2 times more likely that a postal inspector 40 years of age and above will be directed to

transfer than a postal inspector under 40 years of age." 667 F. Supp. at 23.

In order to reach its conclusion, the majority attempts to distinguish *Connecticut v. Teal*, 457 U.S. 440 (1982). Maj. op. at 9. I find the distinction wholly unpersuasive. I read *Teal* as being inconsistent with the Postal Service's argument that the "senior-first" rule must be analyzed as part of the CPP "package" and may not be evaluated in isolation. My understanding of *Teal* is consistent with that expressed by the Third Circuit in *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983), in which the court characterized *Teal* as standing for the proposition that "an employment practice must be analyzed at the first step in the employment process that produces an adverse impact on a [protected group], not the end result of the employment process as a whole." *Id.* at 122.

In *Teal*, Connecticut required all employees to pass a written examination prior to becoming eligible for permanent supervisory positions. Pass rates on the examination were significantly lower for black employees than for white employees, thus excluding a disporportionately high number of black candidates from further consideration. A number of black empolyees brought suit under Title VII, claiming that the examination had a discriminatory impact on black employees and was not job related. The state answered these allegations by arguing that while proportionately fewer blacks became eligible for promotion as a result of the examination, a disproportionately higher number of blacks who were eligible were ultimately given promotions to supervisory positions. The state argued that the "bottom-line" result, which was more favorable to blacks than to whites, constituted a complete defense to the putative Title VII violations.

The Supreme Court rejected Connecticut's "bottom-line" rationale on the ground that Title VII protects individuals, not classes, from discrimination. The Court

made clear that fairness to a group as a whole cannot justify unfairness to individual employees because Title VII's "focus on the individual is unambiguous." *Id.* at 455. Although the *Teal* Court recognized that a nondiscriminatory "bottom-line" might assist an employer in rebutting an inference of discrimination, the Court noted that "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Id.* at 454.

Thus, I would hold that the district court was correct in analyzing and separating out the discrete effects of the "senior-first" rule, and finding that the CPP had a disparate impact on senior-Level 23 inspectors.

E.

The implication of the majority's opinion is that the district court erred in rejecting the Postal Service's statistical data in favor of the data submitted by Arnold.

The Postal Service's statistics analyzed the affect of the "senior-first" rule on *all* postal inspectors, including those who were and are temporarily or permanently exempt from the "senior-first" rule. By using average data and binomial distribution analysis (which predicts the probability of transferring a postal inspector 40 years of age and older when chosen from the entire pool of eligible postal inspectors both over, and under, 40), the Postal Service was able to demonstrate that those over 40 did not stand a significantly higher chance of being transferred, than those under 40.

Arnold's proofs, on the other hand, analyzed the affect of the "senior-first" rule on those to whom the rule applies—non-exempt, Level 23 inspectors. The district court properly concluded that the relevant pool from which to measure the effect of the "senior-first" rule should include only those who are eligible for directed transfer. This conclusion was supported by the testimony of Chief Postal Inspector Clauson who testified that the

CPP necessarily affected the older inspectors adversely. Upon questioning by the court, Chief Clauson testified as follows:

> THE COURT: Now, by the use of the seniority system, it's far more likely than not that that is going to have an effect upon the more senior, older employees, is it not?
>
> THE WITNESS: Yes, your honor. Particularly the directed transfer portion.
>
> THE COURT: That is what I am talking about.
>
> THE WITNESS: Yes.
>
> THE COURT: The directed transfer.
>
> THE WITNESS: Yes.
>
> THE COURT: And that is going to happen in most every case in the directed transfer situation, is it not?
>
> THE WITNESS: Senior person; yes, sir.
>
> THE COURT: And the only way, Chief Clauson, that could be corrected would be to go to a random system of selecting people for directed transfer in order to avoid the impact on age of your seniority system. Ins't that right?
>
> THE WITNESS: That is one way; yes, sir.
>
> THE COURT: It's the only way, isn't it?
>
> THE WITNESS: Well, the other option was to go like the junior and probably the reverse.
>
> THE COURT: That wouldn't have accomplished your mission.
>
> THE WITNESS: That's right. That's right.
>
> THE COURT: But by using seniority, it does have an effect, an adverse effect, by reason of a person's age. Dosen't it?
>
> THE WITNESS: Yes, your honor.

Supp. App. at 52-3.

The district court made a factual finding that Arnold's data and evidence better reflected the effect of the "senior-

first" rule on the protected class of postal inspectors. In light of the evidence of record there can be no doubt that the district court's finding was not clearly erroneous. Because our review of the district court's factual findings is governed by this highly deferential standard, I perceive no principled basis by which to justify the majority's holding that no disparate impact was demonstrated.

F.

In its final argument, with respect to disparate impact, the Postal Service contended that, even if the district court's finding of disparate impact is correct, the court applied the wrong legal standard in holding that no valid "job relatedness" had been demonstrated by the Postal Service with respect to the directed transfer component of the CPP. Although the majority did not find it necessary to discuss this issue because of its holding that the district court had erred, my analysis, which would sustain the district court's findings, obliges me to discuss this issue.

As the Postal Service correctly points out, when disparate impact has been established, an employer's burden of rebuttal has been described by the Supreme Court as showing that the challenged practice is "job related," *New York Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979); that it bears a "manifest relationship" to the job in question, *Griggs v. Duke Power Co.*, 401 U.S. at 432; or that it is justified by "business necessity," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

In this case, the district court stated that in order to "establish a business necessity defendant must have had *no other choice* but to transfer the most senior Level 23 postal inspectors to fill the vacancies in Major Metropolitan Areas." 667 F. Supp. at 23-24 (emphasis added). The Postal Service argued that the district court's "no other choice" standard was unfairly harsh and placed

too great a burden on the Postal Service to prove business necessity.

While I agree that the district court's standard was perhaps demanding in view of the Supreme Court's test as enunciated in *Griggs*, I am convinced that, given the testimony adduced by the Postal Service at trial, *see* 667 F. Supp. at 24, the Postal Service would not have prevailed even under the less stringent standard set forth in *Griggs v. Duke Power*. Thus, if the district court did in fact utilize too demanding a standard. its use of that standard constituted harmless error. In *Griggs*, the Court stated that:

> [t]he touchstone is business necessity. If an employment practice which operates to exclude [the protected class] cannot be shown to be related to job performance, the practice is prohibited . . . . [that employment practice must] bear a demonstrable relationship to successful performance of the jobs for which it was used.

Id. at 431.

Under this standard, which appears to be somewhat more permissive than the standard used by the district court, the business necessity defense of the Postal Service would also fail. The district court noted that in the Postal Service's Chief Inspector's testimony that the "senior-first" rule was justified by the Service's need for:

> (1) more *experienced postal inspectors* in major metropolitan areas, (2) a *perpetual* system for remedying the shortage of experienced postal inspectors in major metropolitan areas, and (3) a *predictable* system for directing transfers of experienced postal inspectors to major metropolitan areas.

667 F.Supp. at 24.

As the district court logically found, these reasons fail to satisfy the "no other choice" test used by the district

court and, in my view, these reasons would also fail the somewhat less demanding "demonstrably related to job performance" test enunciated in *Griggs*. Randomly selecting Level 23 inspectors, rather than requiring "senior-first" transfers, would satisfy the Service's need for a "perpetual," "predictable" system that ensured the placement of "experienced postal inspectors" in major metropolitan areas. This is borne out by the fact that the Service allowed any Level 23 inspector to voluntarily transfer, and even allowed less experienced Level 21 inspectors to transfer to fill MMA vacancies. As the district court observed, "there was more than ample evidence in the record to show that defendant's alleged need for 'expreienced' postal inspectors was no more than a need for Level 21 and higher inspectors." 667 F. Supp at 24.

Indeed, the district court discountd the Postal Service's jurisdiction when it found. "[a]lthough defendant attempts to justify the seior-first rule by arguing that it has a business need for the most senior postal inspectors in the major metropolitan areas, the evidence before the Court clearly shows that defendant's real business need was for Level 21 or higher postal inspectors of *any seniority*." *Id.* at 19. Thus, whatever standard was utilized, it was evident under the district court findings, all of which were supported by evidence, that the Postal Service's business necessity defense was unavailing.

Accordingly, I am satisfied that the district court's reasoning in this respect was sound, its findings were not clearly erroneous, and, each finding was fully supported by evidence.

G.

Overall therefore, I am satisfied that the district court correctly applied a theory or disparate impact. The district court findings were supported by evidence that the Postal Service had violated the ADEA by the "senior-

first" component of the CPP. Those findings must be upheld when reviewed under our clearly erroneous standard.

I turn next to a consideration of disparate treatment.

IV

It has been established under Title VII that *disparate treatment* claims can involve an isolated incident of discrimination against a single individual, or, allegations of a "pattern or practice" of discrimination affecting an entire class of individuals. *Palmer v. Schultz*, 815 F.2d 84, 90 (D.C. Cir. 1987); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 (1977). I see no reason why the district court should not have followed this approach in the ADEA context.

The question before us therefore, is whether the district court improperly found that the CPP was designed and implemented with full knowledge that it intentionally discriminated against Level 23 inspectors aged 40 and above. In *Palmer*, the court stated that plaintiffs in Title VII pattern and practice cases need not rely on statistical evidence alone, to establish intentional discrimination:

> Because the ultimate issue in a disparate treatment case is whether the disparity resulted from unlawful discirminatory animus, plaintiffs may introduce any additional evidence which is probative on this issue . . . . When plaintiffs in a Title VII pattern or practice case rely on evidence in addition to the evidence of the disparity itself, the issue for the trier of fact in determining whether the plaintiffs have established a *prima facie* case must be whether the totality of plaintiff's evidence (again including the evidence of the disparity itself) demonstrates that, more likely than not, the disparity resulted from an unlawful animus . . . .

815 F.2d at 96-7.

Courts generally apply the tripartite evidentiary scheme developed in the context of Title VII litigation to suits brought under the ADEA. *See Coburn v. Pan American World Airways, Inc*, 711 F.2d 339, 342-43 (D.C. Cir.), *cert. denied*, 464 U.S. 94 (1983). Under these guidelines, an individual claiming disparate treatment must make out a *prima facie* case using sufficient facts to give rise to a reasonable inference that race, sex or age was a factor in the employment decision at issue. *Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) "Once a *prima facie* case has been established, the employer bears a minimal burden of "producing evidence" tending to show that the plaintiff was denied employment or promotion for a legitimate nondiscriminatory reason" *Id.* If the employer successfully produces credible evidence to this effect, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the employer's asserted legitimate reason is a "pretext" for discrimination. *Id. (citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-02 (1973)).

In clarifying exactly what type of action rises to the level of disparate treatment, this court has stated:

> In an ADEA case, the plaintiff's ultimate burden is to prove that age was 'a determining factor' in the challenging employment decision . . . . The plaintiff must prove that 'age made a difference in the employer's decision,' . . . in the sense that, 'but for' the discriminatory motive, the employee would have been hired, promoted or retained . . . . The question of discriminatory intent, moreover, is a finding of fact subject to the 'clearly erroneous' standard of review . . . . [A] district court's ADEA ruling . . . can thus only be overturned if the court committed legal error or if we are 'left with the definite and firm conviction that a mistake has been committed.'

Krodel, 748 F.2d at 706.

In the present case, there can be no question but that the district court utilized the proper legal standard when analyzing the effect of the CPP on Level 23 senior inspectors. The district court's analytical framework virtually tracks the framework set forth in *McDonnell Douglas* 411 U.S. at 800-02—a framework subsequently adopted by our court as a model for analyzing disparate treatment claims under the ADEA. *See Krodel*, 748 F.2d at 705-06. The district court methodically analyzed whether the plaintiffs had established a *prima facie* case against the Postal Service; whether the defendant had produced evidence of a legitimate, non-discriminatory reason for the senior-first rule; and whether the plaintiffs proved by a preponderance of the evidence that the Postal Service's reason for the senior-first rule was a pretext for its discriminatory animus.

A. *The Prima Facie Case:*

The district court held that the inspectors established a *prima facie* case by demonstrating that the Postal Service forced its most senior Level 23's to transfer and that there was a statistically significant correlation between seniority and age. The district court found that, because the Service was aware of this correlation, the statistical correlation between the age and seniority was sufficient to raise an inference of disparate treatment. The district court was also persuaded by Chief Inspector Clauson's testimony that "he knew age and seniority correlated and that the senior-first rule would adversely affect the older postal inspectors." 667 F. Supp. at 27. Indeed, Chief Inspector Clauson, in a letter to then Chief Inspector Fletcher, wrote that he believed that any such discriminatory rule would be challenged and that a non-discriminatory system should be used. *Id.* On the basis of this evidence, the district court found that "defendant's disregard for the adverse effect of the Rule on postal inspectors 40 years of age and over and the correlation

between age and seniority raise far more than an inference of age discrimination." *Id.*

I have no difficulty with the district court's finding. It is clear from the evidence produced by Arnold that inspectors over the age of 40 received a statistically disproportionate number of directed transfers. In addition, Clauson testified that when the Service adopted the "senior-first" rule it knew that such rule was the equivalent of an "oldest-first" rule. Supp. App. at 52-3. Clauson testified that he knew that seniority and age were correlated, that he was aware of the antidiscrimination laws, that there was "a good chance, if not [a] certainty" that the directed transfer component of the CPP would be challenged, Supp. App. at 51, and that he knew the "senior-first" rule was "far more likely than not . . . to have an effect upon the more senior, older employees" and "an adverse effect, by reason of a person's age." Supp. App. at 52-53.

Moreover, once a correlation between seniority and age was found, the very provision of the CPP itself which mandates involuntary transfers of senior Level 23 inspectors without more, satisfies the *prima facie* test. I am, therefore, satisfied, even though the majority holds otherwise, that Arnold made out a more than adequate *prima facie* case.

B. *Was There a Legitimate, Non-Discriminatory Reason?*

In the next step of the disparate treatment analysis, the defendant must meet its burden of production by adducing evidence of a legitimate, nondiscriminatory reason for its action. *See Krodel*, 748 F.2d at 705.

The Postal Service claimed that its "senior-first" rule provided a perpetual and predictable system for transferring experienced postal inspectors to the major metropolitan areas. The district court rejected this "business necessity" proffer, as I do. As the district court pointed

out, there was no valid need for the Postal Service to transfer the most senior Level 23 postal inspectors, particularly under a "senior-first" rule which discriminated on the basis of age. 667 F. Supp. at 27.

Moreover, the evidence was undisputed that the Postal Service's need was for Level 21 (or higher postal) inspectors of *any* seniority. *Id.* at 19. As the record discloses the difference between Level 21 and Level 23 inspectors has little to do with familiarity with the particular tasks each is assigned. Rather, the difference is found only in the functional areas in which each operate. *Id.* at 11. Level 21 inspectors have assignments in *four* functional areas while Level 23 inspectors specialize in *one* of those *four* areas. Thus, the explanation provided by the Postal Service for mandatory and involuntary transfers of its older inspectors, when younger inspectors of equal ability were not transferred, just does not hold water.

In a "pattern or practice" class action case such as this one (as opposed to an individual discrimination claim),

> the employer is not required to meet a burden of persuasion in rebutting the disparate treatment claim, [but] the nondiscriminatory explanation must cast sufficient doubt on the plaintiff's proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof. The bare articulation of a nondiscriminatory explanation, while sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing, generally will not suffice as a rebuttal to a typical class-wide showing of pervasive discrimination.

Segar, 738 F.2d at 1269. As the *Burdine* Court put it:

> In saying that the presumption [of discrimination] drops from the case, we do not imply that the trier of fact no longer may consider evidence previously

> introduced by the plaintiff to establish a *prima facie* case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inference properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. *Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.*

Burdine, 450 U.S. at 225 n.10 (emphasis added). It is this underscored language that the district court appears to have relied upon. The district court found that Arnold had adequately discredited the Postal Service's proffered reasons for adopting the "senior-first" rule and it thus concluded that the Postal Service had not sustained its burden of production. Because I am not persuaded, as apparently the majority is (Maj. Op. at 11) that we should ignore the discriminatory prong of the CPP's three-prong policy, and because the "senior-first" prong is in my view, discriminatory and illegal (as the hypothetical example in the Part II of this dissent demonstrates), I would sustain, as not clearly erroneous, the district court finding that the Postal Service has not met its burden of producing evidence of a legitimate non-discriminatory business reason for adopting the CPP.

C. *Was the Postal Service's Proffered Reason a Pretext?*

Although the district court need not have applied this part of the tripartite test, it nevertheless found that, even if the Postal Service had met its burden of production, the Level 23 inspectors had proved that the "senior-first" rule was a pretext for age discrimination in this case and that the service nevertheless knowingly implemented the policy. 667 F. Supp. at 27.

The district court once again noted that the Postal Service knew that seniority and age were correlated and the "senior-first" rule essentially amounted to an "older-first" rule. The district court also emphasized that the Postal Service failed to prove that it needed the most senior Level 23 inspectors to meet its requirements in the MMA's to which they were involuntarily transferred. On the basis of these findings, the district court concluded that the "senior-first rule was a pretext to mask its discriminatory animus and motive." 667 F. Supp. at 28.

While Arnold may not have clearly demonstrated that a discriminatory reason more likely motivated the Postal Service in this case, Arnold has succeeded in demonstrating that the Service's proffered explanation is "unworthy of credence." In *Krodel*, the court made it clear that an ADEA plaintiff need not submit direct evidence of discriminatory intent, and that "'the district court must decide which party's explanation it believes. . . .'" 748 F.2d at 707. The court also stated that:

> [This court] has . . . not required an ADEA plaintiff to offer particularized evidence of intentional discrimination in order to prove pretext . . . In *Cuddy*, the court indicated that age discrimination plaintiffs almost necessarily have to rely on indirect evidence, including discrepancies in the defendant's proffered explanation, to prove that an employer was motivated by illegitimate concerns.

Krodel, 748 F.2d at 707. Applying our standard as discussed in *Krodel*, *I* conclude that the district court was not clearly erroneous in determining that the Postal Service's announced reasons for the "senior-first" policy were pretextual.

Unlike the majority, I do not believe it appropriate to find facts at this level of review. Thus, even if the proofs were otherwise, I cannot find as the majority does, that the Postal Service's "senior-first" policy was "universal" and "neutral." Maj. op. at 12.

V.

Because I cannot agree with the majority interpretation of the ADEA—an interpretation which permits adverse and undesirable employment conditions to be visited upon senior inspectors solely because of their age, and because I cannot agree that non-jury findings of the district court which are supported by evidence should be given no deference, I have been obliged to dissent.

I have gone to some length in this separate opinion to explain my disagreement with the majority's analysis, because I am concerned that a narrow interpretation of the ADEA as the majority has construed it, together with a disregard of district court findings, may well lead to a similar result in other cases—a result, which was not intended by the Congress when it enacted ADEA to protect individuals from age discrimination.

Accordingly, giving the appropriate deference to the district court findings and giving an appropriate construction to the ADEA—a construction which implements the congressional purpose underlying the Act—I would affirm the district court which found that the CPP violates the Act under both disparate impact and disparate treatment theories.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 85-2571, 86-2291

CLYDE J. ARNOLD, JR., *et al.*,
Plaintiffs,

v.

POSTMASTER GENERAL,
Defendant.

CHARLES RAY NETHERTON, *et al.*,
Plaintiffs,

v.

POSTMASTER GENERAL,
Defendant.

Aug. 13, 1987

As Amended Aug. 20 and Nov. 10, 1987

Joseph E. Kolick, Jr. and Cyril V. Smith of Dickstein, Shapiro & Morin, Washington, D.C., for plaintiffs.

Stuart H. Newberger, Asst. U.S. Atty., Anthony W. DuComb, Sr. Atty., and Diana E. Johnson of the U.S. Postal Service, Office of Labor Law, Washington, D.C., for defendant.

CHARLES R. RICHEY, District Judge.

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I. INTRODUCTION AND BACKGROUND [1]

This class action arises out of plaintiffs' challenge to the senior-first rule ("Rule") of the United States Postal Service's Career Path Policy ("CPP" or "Policy"). Pursuant to the senior-first rule, the Postal Service directs the most senior and oldest level 23 postal inspectors from the cities, towns and hamlets across the land to transfer to New York City and thirteen other major metropolitan areas.[2] Directing the most senior level 23 postal inspectors to transfer to major metropolitan areas adversely affects the older postal inspectors because the cost of living and housing in New York City and the other thirteen major metropolitan areas is significantly higher than in non-major metropolitan areas. Defendant knew that the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, prohibits them from implementing policies, such as the Career Path Policy and its senior-first rule, that discriminate against persons because of their age. Nevertheless, defendant began to systematically transfer the most senior and oldest level 23 postal inspectors to major metropolitan areas on December 1, 1980.

Plaintiffs successfully advance two theories in support of their claim that the senior-first rule violates the ADEA. First, plaintiffs establish that the senior-first rule had a disparate impact on postal inspectors 40 years of age and older. In its defense, defendant unpersuasively argues that the senior-first rule was implemented out of an alleged business necessity to alleviate the shortage of

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[1] This Opinion shall constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

[2] Fourteen cities have been designated by the United States Postal Inspection Service as major metropolitan areas: New York, Los Angeles, Chicago, Philadelphia, Detroit, Houston, Boston, San Francisco, Oakland, Washington, D.C., St. Louis, Cleveland, Miami and Newark. *See* Plaintiffs' Exhibit ("PX") 16.

experienced postal inspectors in major metropolitan areas. Plaintiffs convincingly rebut defendant's alleged business necessity defense correctly arguing that defendant's need for experienced postal inspectors could be met by using a non-discriminatory random system.

Plaintiffs' second claim is that the senior-first rule results in the disparate treatment of postal inspectors 40 years of age and above. Plaintiffs' statistical and antedotal testimony clearly raises an inference of discrimination on the basis of age. Defendant fails to proffer a legitimate, nondiscriminatory business reason for reassigning the most senior and older level 23 postal inspectors to the largest and most expensive cities. But, even if defendant's reason was legitimate and nondiscriminatory, plaintiffs proved that defendant's reason was a pretext to hide its discriminatory animus toward older postal inspectors.

In addition to specifically addressing plaintiffs' two theories of disparate impact and disparate treatment, defendant contends that some of the plaintiffs' waived their rights to challenge the senior-first rule under the ADEA when they were arbitrarily transferred under the Career Path Policy. Defendant says that these plaintiffs waived their rights by agreement. Plaintiffs properly assert that no such agreement was made and even if an agreement was made, it is void and unenforceable.

Finally, defendant moves to dismiss plaintiff Brady and Rittiner for failing to comply with the ADEA's notice requirements.

By Order of this Court, the trial was bifurcated into a liability phase and a remedy phase. On May 20-22, 1987, the Court heard the liability phase of this case. Upon thorough consideration of the record, including the testimony, the exhibits, and the Court's judgment as to the credibility of the witnesses herein, the Court certifies this case as a Rule 23(b)(2) class action, grants de-

fendant's motion to dismiss plaintiffs Brady and Rittiner as class representatives, but denies defendant's motion to dismiss Brady and Rittiner as class members, and finds that the plaintiffs did not waive their rights under the ADEA when they were transferred pursuant to the senior-first rule. More importantly, the Court finds that plaintiffs have proved that the senior-first rule violates the ADEA under both a theory of disparate impact and disparate treatment. Accordingly, the Court will issue an order of even date herewith consistent with the Opinion herein.

A. *The United States Postal Inspection Service*

There are approximately 1900 postal inspectors located in the United States and Puerto Rico responsible for protecting the United States mail, postal employees and mail system. These postal inspectors are part of the Postal Inspection Service, which is the law enforcement and audit arm of the United States Postal Service. *See* 39 U.S.C. §§ 404(a)(7) & 2008(d). Incident to its power to investigate criminal offenses, the Postal Inspection Service is charged with enforcing approximately 65 separate statutory sections of the United States Code. *See* Defendant's Exhibit ("DX") 3.

The Postal Inspection Service is administered by the Chief Postal Inspector, who reports directly to the Postmaster General. From 1979 through 1985, Kenneth Fletcher was Chief Postal Inspector until replaced by Charles Clauson, who holds the position today. Reporting to the Chief Postal Inspector are Assistant Chief Postal Inspectors, who oversee Regional Chief Postal Inspectors. Each region is comprised of Divisions headed by an Inspector-in-Charge. In 1982, the 17 Divisions were reorganized to form 39 Divisions. Each division is further divided into domiciles.

Except for the period between 1970 and 1984, postal inspectors have been recruited from within the Postal

Service, and after 1984 have been required to have a college degree. *See* DX 7. Postal Inspection Service regulations require postal inspectors to relocate when lawfully and legitimately dictated by the needs of the Service. *See* DX 10. To be hired, each postal inspector must state that he or she is willing to relocate pursuant to a lawful policy to anyplace in the continental United States, Puerto Rico, Alaska and Hawaii. *See* DX 7 & 11A-2. Importantly, these relocation requirements do not mention the Age Discrimination in Employment Act or that a transfer policy, such as the senior-first rule, must comply with the ADEA, or that signing such statements constitutes a waiver of any rights under the ADEA. *See id.*

After 11 weeks of training in Potomac, Maryland, *see* DX 7, postal inspectors spend one year as a level 17 postal inspector. They then spend one year at level 19 and two years at level 21 before being promoted to level 23.[3] The primary difference between level 21 and level 23 does not stem from familiarity with the various tasks postal inspectors perform, but from the procedure by which postal inspectors are assigned work. Level 21 postal inspectors receive miscellaneous assignments spanning four functional areas, which include fraud and prohibited mailings, audit, external crimes (crimes committed against the Postal Service by non-employees), and internal crimes (crimes committed against the Postal Service by employees). Thus, level 21 postal inspectors are familiar with all four functional areas. Level 23 postal inspectors, however, specialize in one functional area, and receive assignments only in that one area.

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[3] This promotion schedule commenced in late 1983. Prior to 1983, postal inspectors were promoted to level 19 after one year of satisfactory service at level 17, were then promoted to level 21 after one and one-half years of satisfactory service at level 19, and were promoted to level 23 on a competitive basis regardless of the amount of time served at level 21.

B. *The United States Postal Inspection Service's Career Path Policy*

In response to a shortage of experienced postal inspectors in the fourteen major metropolitan areas, particularly New York City, the United States Postal Inspection Service instituted the Career Path Policy on December 1, 1980. *See* Plaintiffs' Exhibit ("PX") 16. The Policy has three means of effecting five year reassignments to major metropolitan areas—voluntary level 23 lateral reassignments, voluntary level 21 lateral reassignments and involuntary directed transfers of the most senior level 23s in the nation. *See* PX 16. Plaintiffs challenge only this latter component of the Policy otherwise known as the senior-first rule because it transfers the older postal inspectors first. To fully understand why the senior-first rule violates the ADEA and why defendant does not have a legitimate need for the senior-first rule it is necessary to consider the aspects of the Career Path Policy not challenged by plaintiffs.

The first aspect of the Policy *not* challenged here is the voluntary level 23 lateral reassignment. A voluntary level 23 lateral reassignment occurs when a level 23 postal inspector volunteers to serve five years in a major metropolitan area with a vacancy. If more than one level 23 postal inspector bids on a given vacancy, the postal inspector who bid for the vacancy first is awarded the lateral reassignment, regardless of the relative seniority of the competing bidders. *See* PX 16.

The second aspect of the Career Path Policy which is *not* challenged is that permitting voluntary level 21 lateral reassignments. If a vacancy is not filled by a voluntary level 23 lateral reassignment, the Postal Inspection Service advertises the vacancy among level 21 postal inspectors. Level 21 postal inspectors may then volunteer for a lateral reassignment as a level 21 postal inspector or bid on a level 23 vacancy. *See* Defendant's Proposed Findings of Fact ("DF") ¶ 38. When more

than one level 21 postal inspector bids on a level 23 vacancy, the most qualified bidder is reassigned. *See* PX 16.

The third aspect of the Career Path Policy that *is* being challenged here can be described as follows. If a vacancy is not filled by a voluntary level 21 or level 23 lateral reassignment, the Postal Inspection Service *directs* the most senior eligible level 23 postal inspector in the nation to serve five years in the major metropolitan area with the vacancy. *See* PX 16. Although level 23 postal inspectors specialize in one of four functional areas, the senior postal inspector's area of expertise is *not* considered when directing transfers. *Seniority is the sole consideration* in the directed transfers under attack in the case herein. As indicated, plaintiffs challenge this senior-first rule of the directed transfer component of the Policy.

The Career Path Policy has certain exemptions which are also *not* challenged here. These exemptions are relevant because they determine whether a postal inspector is subject to the senior-first rule. Whether a postal inspector is eligible to receive a directed transfer depends on whether he or she appears on the directed transfer list of level 23 postal inspectors or is exempt from that list. All level 23 postal inspectors are ranked on the directed transfer list in order from the most senior to the least senior with the following exceptions: 1) postal inspectors within five years of retirement eligibility are permanently exempt; 2) postal inspectors appointed before December 15, 1980 are permanently exempt (this would have exempted all 39 named plaintiffs but for the fact that this exemption was not created until September 23, 1985, after this litigation began); 3) postal inspectors who have physically relocated to a new residence as a result of an official reassignment or promotion are temporarily exempt for two years, and if reassigned to Hawaii, Alaska, or Puerto Rico, are temporarily exempt for three years; 4) postal inspectors currently assigned to major metro-

politan areas are temporarily exempt as long as they are assigned to the major metropolitan area; and 5) postal inspectors who have served five years in a major metropolitan area at level 23 or level 24 are permanently exempt. *See* PX 16. As postal inspectors become exempt or their temporary exemptions expire, the composition of the pool of postal inspectors eligible for directed transfers changes. Consequently, the exemptions cause a particular postal inspector's rank on the directed transfer list to change from day to day.

II. PROCEDURAL HISTORY

Three groups of plaintiffs filed requests for administrative relief with defendant and later with the Equal Employment Opportunity Commission ("EEOC"). The Court will describe those three groups and their status. This description is set forth so that the chronology of this case can be understood, but the net effect is that all three groups are part of the certified class in this case.

Almost two years after the implementation of the Career Path Policy in December of 1980, Charles Netherton filed a class action on behalf of himself and other similarly situated Postal Inspectors in the United States District Court for the Middle District of Florida. *See Netherton v. United States Postal Service*, Civil Action 82-504-ORL-CIV-R (filed Sept. 28, 1982 M.D. Fla.). Upon filing the lawsuit, Mr. Netherton moved for a temporary restraining order to enjoin the Postal Service from directing him to transfer to New York City. On October 1, 1982, Mr. Netherton's motion was denied in that court. Subsequently, defendant filed a motion to dismiss or for summary judgment, which on June 17, 1983, was also denied. The *Netherton* case was then stayed pending the conclusion of plaintiffs' administrative proceedings before the Equal Employment Opportunity Commission ("EEOC").

In July of 1983 the complaints examiner issued a decision in the *Netherton* case recommending that the Career Path Policy violated the ADEA. On August 30, 1983, the Postal Service rejected the recommendation of the complaints examiner and found that the Policy did not violate the ADEA. A motion to lift the stay was filed by defendant on September 6, 1983 and denied on October 12, 1983. On September 20, 1983, the *Netherton* plaintiffs filed a consolidated appeal with the EEOC of the Postal Service's final decision.

On March 25, 1985, the EEOC dismissed the *Netherton* plaintiffs' appeals because the United States District Court for the Middle District of Florida had retained jurisdiction over their claims. Defendant then moved to dismiss the second group of plaintiffs' appeals to the EEOC. Defendant's motion is still pending before the EEOC. *Cf. Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir. 1975) (any action taken pursuant to a regulation is independent of an employee's right to file a civil action and can be simultaneous with the civil action).

During this time, postal inspectors Arnold, Bell, D. Brown, Garland, LeBlanc, Nelson and Syverson filed administrative complaints challenging the senior-first rule as a violation of the ADEA. In September of 1984, the complaints examiner again issued a recommended decision that the Policy violated the ADEA. Again, the Postal Service rejected the complaints examiner's recommendation. On October 29, 1984, this second group of postal inspectors appealed the Postal Service's final decision to the EEOC. That appeal is still lying dormant before the EEOC. *Cf. Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir. 1975) (any action taken pursuant to a regulation is independent of an employee's right to file a civil action and can be simultaneous with the civil action).

Meanwhile, a third group of plaintiffs, Bottita, R. Brown, Hill, Hoffman, Hurlbut, Jones, Kamin, Kennerson, Lingle, Manning, Martinez, McClelland, Parkinson,

Post, Reinardy, Scott and Thompson, also filed administrative complaints contesting the senior-first rule on the ground that it violates the ADEA. In a decision dated May 20, 1985, the Postal Service cancelled the Administrative complaints of this third group of plaintiffs. These plaintiffs' subsequent appeals to the EEOC are also still pending. *Cf. Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir. 1975) (any action taken pursuant to a regulation is independent of an employee's right to file a civil action and can be simultaneous with the civil action).

On June 11, 1985, the *Netherton* plaintiffs moved the United States District Court for the Middle District of Florida to dismiss their case without prejudice. Defendant opposed plaintiffs' motion and moved to lift the stay. On June 25, 1985, plaintiffs' motion to dismiss was denied and defendant's motion to lift the stay was granted. On or about September 4, 1985, defendant moved the United States District Court for the Middle District of Florida to certify the *Netherton* case as a class action. That motion remained pending until the parties consented to a conditional class certification at the May 18, 1987 pretrial conference before this Court.

On August 13, 1985, the second and third groups of plaintiffs filed suit in the United States District Court for the District of Columbia. *See Arnold v. United States Postal Service*, 649 F.Supp. 676 (D.D.C.). Four additional plaintiffs joined the second and third groups of plaintiffs in the *Arnold* lawsuit—Rittiner, Brady, Jas and Cyryt. Defendant's motion to dismiss plaintiffs Brady and Rittiner as class representatives is addressed herein.

Six days after the *Arnold* case was filed, the *Netherton* plaintiffs moved to transfer the *Netherton* case from the United States District Court for the Middle District of Florida to the United States District Court for the District of Columbia. By Order dated August 8, 1986 the *Netherton* case was transferred, and on September 16,

1986, the *Netherton* and *Arnold* cases were consolidated by consent of the parties pursuant to Federal Rule of Civil Procedure 42(a).

After the *Netherton* and *Arnold* cases were consolidated, cross motions for summary judgment and defendant's motion to strike all of plaintiffs' requests for damages other than backpay were considered. In an Opinion dated December 9, 1986, this Court denied the cross motions for summary judgment because there were genuine issues of material fact as to whether the senior-first rule constituted disparate treatment of plaintiffs on the basis of age and whether the senior-first rule had a disparate impact on postal inspectors 40 years of age and above. *See Arnold v. United States Postal Service*, 649 F.Supp. 676 (D.D.C. 1986).

Upon consideration of defendant's motion to strike plaintiffs' request for all relief beyond backpay, the Court denied, without prejudice, defendant's motion to strike, reserving final judgment on remedies until and if the Court finds defendant liable. *See id.* at 684. Consistent with the order denying defendant's motion to strike, by Order of April 28, 1987, the Court bifurcated the liability and remedy stages of the trial.

III. PROCEDURAL RULINGS

A. *Class Certification Is Appropriate Under Rule 23(b)(2) and Local Rule 203.*

1. *Both Parties Sought Class Certification.*

Whether class certification is appropriate in this case has been an issue from the day Mr. Netherton filed the first of these consolidated cases. *See* Complaint, *Netherton v. United States Postal Service*, Civil Action 82-504-ORL-CIV-R (filed Sept. 28, 1982 M.D.Fla.). In his complaint, Mr. Netherton purported to represent a class

> comprised of a group of persons who are or who have been senior level 23 non-exempt Postal Inspectors, age 40 and above, who have been, are being, or may be adversely affected by the forced transfer provisions of the Inspector Career Path Policy. The class includes all Postal Inspectors presently on the seniority list of non-exempt Level 23 Postal Inspectors used by the Chief Inspector for the purpose of making forced transfers under the policy . . . . It includes those Level 23 Postal Inspectors above the age of 40 who have only a temporary exemption to the policy. The class further includes the senior non-exempt Level 23 Postal Inspectors who have been previously injured under the policy or who have preserved their right to obtain relief by the previous filing or attempted filing of individual complaints of Age Discrimination.

Id. at 2-3, ¶ 5. On or about September 4, 1985, the issue of class certification was against raised, but this time by defendant. Defendant moved the United States District Court for the Middle District of Florida to certify the following class pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> Present, former, or future Postal Inspectors who have, or will have, timely filed administrative complaints pursuant to 29 C.F.R. Part 1613 asserting that the Postal Inspection Service Career Path Policy adversely impacted them by causing their transfer or resignation from the Inspection Service when they were 40 years of age or older in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 633a.

Motion for Certification, *Netherton v. United States Postal Service*, Civil Action 82-504-ORL-CIV-R (filed Sept. 4, 1985 M.D.Fla.). When the *Netherton* case was transferred to this Court on August 8, 1986, the United States

District Court for the Middle District of Florida had not decided either plaintiffs' or defendant's requests for class certification. Accordingly, this Court inherited the class certification issue.

2. *By Consent, the Parties Agreed to Tentative Class Certification Under Rule 23(b)(2) to Include Postal Inspectors Affected by the Career Path Policy.*

At the May 18, 1987 pre-trial conference, upon consent of the parties, the Court granted defendant's motion for class certification under Rule 23(b)(2). By oral stipulation, the parties defined the class to include

> All postal inspectors of the United States Postal Service between December 1, 1980 and September 1, 1985 who were, are, or have been affected by the Career Path Policy.

3. *Plaintiffs Only Challenge the Senior-First Rule of the Career Path Policy; Therefore, the Court Will Redefine the Class to Comprise Only Postal Inspectors Affected by the Senior-First Rule Because Only They Have Standing to Challenge the Rule.*

Notwithstanding that the class was tentatively certified upon consent of the parties to include postal inspectors affected by the "Career Path Policy," plaintiffs only challenge the senior-first rule of that Policy. To join the class each class member must have standing to challenge the senior-first rule. *See Foster v. Center Township of LaPorte County*, 798 F.2d 237, 244 (7th Cir.1986); *Slaughter v. Levine*, 598 F.Supp. 1035, 1041 (D.Minn. 1984), *aff'd in part and rev'd on other grounds*, 801 F.2d 288 (8th Cir.1986) (citing *Lamb v. Hamblin*, 57 F.R.D. 58, 60-61 (D.Minn.1972); *Metropolitan Area Housing Alliance v. United States Department of Housing and Urban Development*, 69 F.R.D. 633, 633 (D.Ill.1976));

McElhaney v. Eli Lilly & Co., 93 F.R.D. 875, 878 (D.S.D. 1982).

The tentative class comprising postal inspectors affected by the Career Path Policy is overbroad in that it includes postal inspectors affected by parts of the Career Path Policy beyond the senior-first rule, such as the voluntary level 21 and 23 lateral reassignment provisions. Because postal inspectors not injured by the senior-first rule do not have standing to challenge that rule, the Court will exercise its authority to limit the class to include only postal inspectors who have been affected by the senior-first rule. *See Sears v. Atchison, Topeka & Santa Fe Railway*, 749 F.2d 1451, 1456 (10th Cir.1984); *Slaughter*, 598 F.Supp. at 1041; *Graham v. Heckler*, 573 F.Supp. 1573, 1581 (N.D.W.Va.1983); *Lamb*, 57 F.R.D. at 60-61; *Metropolitan Area Housing Alliance*, 69 F.R.D. at 633. Those with standing include senior postal inspectors who because of the senior-first rule were directed to transfer, resigned to avoid a directed transfer, or volunteered for lateral reassignment to avoid a directed transfer, or others adversely affected by the senior-first rule. Accordingly, the Court redefines the class to include the following postal inspectors:

> All postal inspectors of the United States Postal Service between December 1, 1980 and September 1, 1985 who were, are, or have been affected by the senior-first rule of the Career Path Policy.

4. *Rule 23 Applies to Class Actions Against the Federal Government, Rather Than the ADEA's Opt-In Requirement Applicable to Private Employers.*

Discrimination on the basis of age is prohibited by two distinct sections of the ADEA—section 623(a)(1) prohibits discrimination by private employers and section 633a(a) prohibits discrimination by federal employers.

On April 6, 1978, the section prohibiting age discrimination by federal employers was amended as follows:

> Any personnel action of any department, agency, or other entity referred to in subsection [633a(a)] shall not be subject to, or affected by, any provision of the [ADEA], other than the provisions of [subsection 631(b)] and the provisions of [section 633a].

29 U.S.C. § 633a(f).

Prior to the 1978 amendment, ADEA actions against employers were "enforced in accordance with the powers, remedies, and procedures . . . of the Fair Labor Standards Act ["FLSA"]," 29 U.S.C. § 626(b), which has an affirmative opt-in requirement for class actions: no person may become a plaintiff "unless he gives his consent in writing to become such a party." 29 U.S.C. § 216. This opt-in requirement is incorporated through section 626(b) of the ADEA and is mutually exclusive with Rule 23.

Since the 1978 amendment, providing that only subsection 631(b) and section 633a of the ADEA apply to federal employers, the FLSA's affirmative opt-in requirement for class actions does not apply to federal employees. *See Moysey v. Andrus*, 481 F. Supp. 850 (D.D.C. 1979), *appeal withdrawn*, U.S.C.A. No. 80-2174 (D.C. Cir. Sept. 25, 1980). Accordingly, this Court in *Moysey* certified the class under Rule 23(b)(1)(B) and 23(b)(2). *Id.* at 854-55; *see also Christie v. Marston*, 19 FEP 87 (N.D. Ill. 1979) (Rule 23 class action against Federal Home Loan Bank Board). Class certification under Rule 23 is similarly appropriate in this case.

5. *Class Certification Is Appropriate Under Rule 23 and Local Rule 203.*

Rule 23(a) and Local Rule 203 of this Court permit class certification only if (1) the class is so numerous as to make joinder impracticable, (2) there are common questions of law and fact, (3) the claims of the repre-

sentative parties are typical of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a); Local Rule 203.

The Court can be certain that the class will include no less than the 39 plaintiffs named in the *Netherton* and *Arnold* complaints and may, based on defendant's representation, encompass as many as several hundred plaintiffs. In that joinder would be impracticable with a class of 39 to a few hundred plaintiffs, the numerosity requirement of Rule 23(a)(1) is satisfied.

As defendant's motion for class certification suggests and the complaints herein allege, all plaintiffs challenge the senior-first rule of the Career Path Policy on the ground that it violates the Age Discrimination in Employment Act. Accordingly, there are common questions of law and fact as required by Rule 23(a)(2).

Thirty-nine plaintiffs are named in the two complaints. Each of these representative plaintiffs claims to have been affected by the senior-first rule and challenges the Rule under the ADEA. The class these plaintiffs represent comprises all postal inspectors affected by the senior-first rule. Thus, the Court finds that Rule 23(a)(3)'s prerequisite that the claims of the representative parties be typical is satisfied.

Rule 23(a)(4) requires the representative parties to fairly and adequately protect the interests of the class. This requirement has two components. First, the representatives' interests must not be antagonistic to the interests of the class. This is not the case here, as the representatives and the class both want the Court to find that the senior-first rule violates the ADEA. Secondly, class counsel must be diligent and competent. That class counsel satisfies this requirement is borne out by the record. Thus, Rule 23(a)(4) is met.

Finally, Rule 23(b)(2) permits class certification only if the party opposing the class has acted against the whole class, making injunctive or declaratory relief against the defendant appropriate for the class as a whole. *See* Fed. R. Civ. P. 23(b)(2). At issue here is a rule that, by operation, applies to all senior postal inspectors unless specifically exempted. Because defendant has acted against the protected class as a whole, certification under Rule 23(b)(2) is appropriate. Therefore, in accordance with Federal Rule of Civil Procedure 23 and Local Rule 203, the Court finds that a Rule 23(b)(2) class action is appropriate and proper in this case.

B. *Although Most of the Named Plaintiffs Met the ADEA's Notice Requirements, Defendant's Motion to Dismiss Brady and Rittiner as Class Representatives Must be Granted Because They Did Not Satisfy the Notice Requirements; Brady and Rittiner May, However, be Eligible for Relief as Members of the Protected Class and, Therefore, Defendant's Motion to Dismiss Brady and Rittiner as Class Members Is Denied.*

To bring an ADEA action against a federal employer a federal employee must, within 180 days from the alleged discriminatory act, give the EEOC a 30 day notice of an intention to sue. *See* 29 U.S.C. § 633a(d); *McKinney v. Dole*, 765 F.2d 1129, 1140-41 (D.C. 1985); *Macellaro v. Goldman*, 643 F.2d 813 (D.C. Cir. 1980). Alternatively, a federal employee may choose to file a complaint with the EEOC. *See* 29 U.S.C. § 633a(d); *Dodson v. United States Army Finance and Accounting Center*, 636 F. Supp. 894, 896 (S.D. Ind. 1986).

Defendant concedes that each of the plaintiffs filed a timely administrative complaint challenging the senior-first rule as a violation of the ADEA, with the exception of plaintiffs Brady and Rittiner. Mr. Brady was ordered to transfer on October 5, 1983 and transferred on Janu-

ary 9, 1984. Rather than file a notice of intent to sue, Mr. Brady filed an administrative complaint on January 13, 1984. On May 3, 1984 the United States Postal Service rejected Mr. Brady's complaint because it was not timely filed. Mr. Brady did not appeal that action to the EEOC within 20 days or file a civil suit within 30 days as required by the applicable regulations. *See* 29 C.F.R. § 1613.281(a) (upon receipt of notice of final agency action on the complaint, the complainant may appeal to the EEOC within 20 days or file a civil action within 30 days). Accordingly, defendant's motion to dismiss Mr. Brady as a class representative must be granted with the caveat that plaintiff Brady may still obtain relief as a class member.

Mr. Rittiner was directed to transfer on September 3, 1981. He filed an administrative complaint and it was rejected on June 8, 1982. Mr. Rittiner also chose not to appeal the agency's decision to the EEOC within 20 days or to file a civil action within 30 days. *See* 29 C.F.R. § 1613.281(a) (upon receipt of notice of final agency action on the complaint, the complainant may appeal to the EEOC within 20 days or file a civil action within 30 days). Accordingly, defendant's motion to dismiss Mr. Rittiner as a class representative must be granted with the caveat that plaintiff Rittiner may still obtain relief as a class member.

The plaintiffs Brady and Rittiner cannot remain named as class representatives does not preclude them from obtaining relief under the ADEA as class members in a Rule 23 class action. In an ADEA class action against a private employer, courts have held that consenting class members need not individually comply with the charge-filing requirements. *See, e.g., Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-95 & n.3 (10th Cir. 1980); *Bean v. Crocker National Bank*, 600 F.2d 754, 759 (9th Cir. 1979); *Russell v. Curtin Matheson Scientific, Inc.*, 17 FEP 845, 848 (S.D. Tex.), *app. den.*, 18 FEP Cas 866

(5th Cir.), *cert. denied*, 439 U.S. 972, 99 S.Ct. 466, 58 L.Ed.2d 432 (1978). Similarly, under Title VII, where class actions are maintained under Rule 23, only the named plaintiff need satisfy the charge-filing requirements. *See, e.g., Inda v. United Airlines*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed.2d 388 (1978); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3rd Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Therefore, since this case is a Rule 23 class action under the ADEA, the Court concludes that plaintiffs Brady and Rittiner are entitled to relief as class members if they were employed by the United States Postal Service between December 1, 1980 and September 1, 1985 and affected by the senior-first rule of the Career Path Policy.

C. *All of the Named Plaintiffs Have Standing to Challenge the Senior-First Rule.*

The ADEA prohibits "all [discriminatory] personnel actions *affecting* employees . . . who are at least 40 years of age," 29 U.S.C. § 633a(a) (emphasis added), and gives standing to sue to all "aggrieved persons." 29 U.S.C. § 633a(c). All 39 named plaintiffs were at least 40 years of age when they were adversely *affected* by the Career Path Policy. Each was ranked on the directed transfer list, placing them in imminent jeopardy of being directed to transfer. Except for Albert Brady, all the named Plaintiffs were at least 40 years of age when they were affected, *see* 29 U.S.C. § 633a(c) (aggrieved persons may sue), or injured, *see, e.g., Synar v. United States*, 626 F. Supp. 1374, 1380 (D.D.C. 1986) (actual or threatened injury necessary for standing), by the senior-first rule because they received orders directing them to transfer to a major metropolitan area, or resigned or volunteered for a lateral reassignment to avoid a directed transfer. *See* PX 2-15, 51 & 52.

Plaintiffs Arnold, Brady, R.G. Brown, Caldwell, Day, DeFord, Erwin, Garland, Gholson, Hermanson, Hill, Hoffman, Jas, Jones, LeBlanc, Lingle, Manning, Martinez, Nelson, Netherton, Post, Reed, Rittiner, Scott, Syverson, and Tangney received directed transfers to major metropolitan areas when they were 40 years of age and above. *See* PX 51 & 52. Therefore, they were 40 years of age and older when they were adversely affected by the Policy.

Plaintiffs Bell, D.E. Brown, Bye, Kamm, Parkinson, Reinardy, and Thompson resigned when they were 40 years of age or older to avoid a directed transfer. Each of these plaintiffs was in imminent jeopardy of receiving a directed transfer because of their ranking on the seniority list. *See* PX 2-15, 44-50. All of these plaintiffs had family and financial restraints that compelled them to resign to avoid the adverse effects of a directed transfer.

When plaintiffs Bottita, Cyryt, Helmer, Hurlbut, Kenerson, and McClelland were 40 years of age and older, they were forced to volunteer for a lateral reassignment to an undesirable major metropolitan area to avoid a directed transfer to an even less desirable major metropolitan area. Each of the plaintiffs who volunteered for a lateral reassignment did so because they were approaching the point on the directed transfer seniority list where a directed transfer was imminent. *See* PX 2-15, 38-43. All of these plaintiffs had family and financial restraints that compelled them to volunteer for transfer to avoid the adverse effects of a directed transfer.

Albert Brady was 39 when he received a directed transfer to New York. Although Mr. Brady was not 40 years of age when he was notified that he would be directed to transfer, he was 40 years of age when he was *affected* by a discriminatory personnel action, the senior-first rule. Mr. Brady was reassigned to New York City for five years from the day he reported for duty; he was 40 years old when he reported for duty. *See* PX 16 & 51.

But for the Rule, Mr. Brady would not have been transferred and serving five years in New York City. Therefore, the Court finds that because Mr. Brady was *affected* by the senior-first rule when he was 40 years of age, he has standing to challenge that Rule. *See* 29 U.S.C. § 633a(c) (agrieved persons may sue), or injured; *see also, Synar v. United States*, 626 F. Supp. 1374, 1380 (D.D.C. 1986) (actual or threatened injury necessary for standing).

IV. WHEN PLAINTIFFS "ACCEPTED" TRANSFERS UNDER THE CAREER PATH POLICY, THEY DID NOT WAIVE THEIR RIGHTS TO CHALLENGE THE SENIOR-FIRST RULE AS A VIOLATION OF THE ADEA.

Defendant's cross-examination of plaintiffs attempted to suggest that plaintiffs waived their rights to challenge transfers as a violation of the ADEA because plaintiffs knew that arbitrary transfers could be made at any time to any place when they became postal inspectors. While there is no question that plaintiffs knew they might be arbitrarily transferred, there is also no question that plaintiffs did not knowingly and voluntarily agree to be systematically transferred pursuant to a senior-first rule that unlawfully discriminated against them because of their age. Indeed, if defendant had transferred postal inspectors on a random basis, the disparate impact of the senior-first rule would have been avoided because a random system does not select the oldest postal inspector for transfer first.

That plaintiffs might be transferred at any time to any place to serve the needs of the Inspection Service is not a circumstance or fact which supports a factual or legal conclusion that it was a knowing and voluntary waiver of plaintiffs' prospective rights under the ADEA. *See United States EEOC v. County of Calumet*, 686 F.2d 1249, 1254 (7th Cir.1982) (employees do not waive rights

under the ADEA where agreement does not expressly make reference to the ADEA or waive their rights under the ADEA). Even if it could be said that plaintiffs agreed to waive their rights by agreeing to transfer, such an agreement is void and unenforceable because it is contrary to public policy. *See, e.g., Evans v. Jeff*, 475 U.S. 717, 106 S.Ct. 1531, 89 L.E.d2d 747 (1986); *Southland Corp v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); Restatement (Second) of Contracts sec. 178 (1981). Therefore, the Court finds that because defendant is prohibited by the ADEA from transferring plaintiffs pursuant to a policy that discriminates on the basis of age, plaintiffs may challenge the Rule as a violation of the ADEA.

V. THE SENIOR-FIRST RULE OF THE CAREER PATH POLICY VIOLATES THE AGE DISCRIMINATION IN EMPLOYMENT ACT BOTH UNDER A THEORY OF DISPARATE IMPACT AND DISPARATE TREATMENT.

Section 633a of the Age Discrimination in Employment Act ("ADEA"), which applies to federal employers, provides that

> [a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . in the United States Postal Service . . . shall be made free from any discrimination based on age.

29 U.S.C. § 633a(a); *see also* 29 U.S.C. § 631(b) (protected class includes individuals at least 40 years of age). Plaintiffs advance two theories to prove that the senior-first rule discriminates against them based on age. First, plaintiffs contend that the senior-first rule has a disparate impact on postal inspectors 40 years of age and above. Plaintiffs' statistics establish that the adverse effects of the senior-first rule, which involuntarily transfers the oldest postal inspectors to cities with high costs of living,

or causes them to resign or volunteer for lateral reassignment to avoid an involuntary transfer, falls more harshly on postal inspectors 40 years of age and older than on postal inspectors under 40 years of age. Although defendant attempts to justify the senior-first rule by arguing that it has a business need for the most senior postal inspectors in the major metropolitan areas, the evidence before the Court clearly shows that defendant's real business need was for level 21 or higher postal inspectors of *any seniority*. Moreover, plaintiff convincingly proved that even if defendant's business need was for senior postal inspectors, that need could have easily been met by a nondiscriminatory, random transfer system.

Second, plaintiffs show that the senior-first rule constitutes disparate treatment because defendant knew that age and seniority were correlated when implementing the senior-first rule of the Career Path Policy and, therefore, intentionally subjected plaintiffs to disparate treatment because of their age by transferring them to cities with high costs of living. Defendant was unable to proffer a legitimate, nondiscriminatory reason for using the senior-first rule because no such reason exists. Indeed, plaintiffs have proved that defendant's alleged reason for the senior-first rule was pretextual and only served the purpose of masking defendant's unlawful motives. Therefore, upon consideration of all the evidence, the Court finds that Plaintiffs succeed on both theories.

A. *The Senior-First Rule Has a DISPARATE IMPACT on Postal Inspectors 40 Years of Age and Older.*

It is well settled that a violation of the ADEA may be proved by showing that an employment practice, such as the senior-first rule, which is involved in this case, has a disparate impact on a protected class, namely postal inspectors 40 years of age and above. *See EEOC v. Borden's Inc.*, 724 F.2d 1390, 1394-95 (9th Cir.1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir.1983); *Geller v. Markham*, 635 F.2d 1027, 1032

(2d Cir.1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981); *Arnold v. United States Postal Service*, 649 F.Supp. 676, 679-81 (D.D.C.1986); *EEOC v. Westinghouse Electric Corp.*, 632 F.Supp. 343, 370 (E.D.Pa.1986); *EEOC v. Governor Mifflin School District*, 623 F.Supp. 734, 738-41 (E.D.Pa.1985); *see also Schmid v. Frosch*, 680 F.2d 248, 249-50 (D.C.Cir.1982) (implicitly approving a disparate impact theory); *Allison v. Western Union Telegraph Co.*, 680 F.2d 1318, 1323 (11th Cir.1982) (same). To prove age discrimination under a disparate impact theory, plaintiffs need only establish that the senior-first rule disproportionately impacts, or falls more harshly on, postal inspectors 40 years of age and above. *See Leftwich*, 702 F.2d at 690; *Geller*, 635 F.2d at 1032. Such an impact is typically evidenced, as was presented in this case, by statistics from which discrimination may be inferred. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 91 n. 6 (D.C.Cir.1987) (statistical analysis must focus on appropriate source pool, which includes *only* those qualified for promotion, or in this case, those eligible for transfer); *Segar v. Smith*, 738 F.2d 1249, 1274 (1984) (same), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); *Leftwich*, 702 F.2d at 690; *Geller*, 635 F.2d at 1032. Moreover, unlike a disparate treatment case, plaintiffs need not prove discriminatory motive and animus in a disparate impact case. *E.g., Leftwich*, 702 F.2d at 690; *Geller*, 635 F.2d at 1032.

1. *The Plaintiffs Have Established That the Senior-First Rule Is a Rule That Falls More Harshly on Postal Inspectors 40 Years of Age and Over.*

   a. *The Senior-First Rule Is a Discriminatory Employment Policy.*

Defendant argues in its post-trial brief that plaintiffs' disparate impact claim must fail because plaintiffs do not challenge an appropriate employment practice which disparately impacts them. *See* Defendant's Post-Trial Brief

at 2-3 (filed June 9, 1987). Plaintiffs, however, have made it clear since this lawsuit was filed that they challenge the discriminatory senior-first rule of the Career Path Policy. *See* Complaint, *Netherton v. United States Postal Service*, Civil Action 82-504-ORL-CIV-R (filed Sept. 28, 1982 M.D.Fla.); Complaint, *Arnold v. United States Postal Service*, 649 F.Supp. 676 (D.D.C.). It is defendant who has tried to mischaracterize plaintiffs' challenge to encompass the entire Career Path Policy in order to dilute the adverse impact that the senior-first rule has on plaintiffs. Plaintiffs have never challenged the aspects of the Policy permitting postal inspectors to volunteer for lateral reassignment.

b. *Defendant's Senior-First Rule Has a Statistically Significant DISPARATE IMPACT on Plaintiffs.*

i. *The Relevant Time Period Is From December 1, 1980 to September 1, 1985.*

Plaintiffs were subject to the senior-first rule from its implementation on December 1, 1980 until September 23, 1985 when the Postal Service exempted from directed transfers all those who were postal inspectors on December 1, 1980. *See* PX 16-E. By consent of the parties, the Court has certified a class comprising postal inspectors employed by the Postal Service between December 1, 1980 and September 1, 1985. This time frame was agreed to by counsel for the parties. Accordingly, the relevant time period for the purposes of analyzing the adverse effects of the senior-first rule on plaintiffs is from December 1, 1980 until September 1, 1985. *See Palmer v. Shultz*, 815 F.2d at 91 n. 6; *Segar v. Smith*, 738 F.2d at 1274.

ii. *The Effect of the Senior-First Rule Is Most Accurately Reflected by Plaintiffs' Statistics.*

Experts for both parties presented a multiplicity of statistics. Notwithstanding the statisticians' consensus as to the accuracy of each others arithmatical calculations,

they reached opposite conclusions. This difference of opinion requires the Court to decide which statistics are appropriate. *See Palmer v. Shultz*, 815 F.2d at 91 n. 6; *Segar v. Smith*, 738 F.2d at 1274. For the reasons that follow the Court finds that plaintiffs' statistics best reflect the actual effect of the senior-first rule on plaintiffs.

First, plaintiffs' calculations analyze the effect of the senior-first rule on those to whom the rule applies, namely, eligible, or non-exempt, level 23 postal inspectors. In contrast, defendant analyzes the effect of the rule on all postal inspectors, including those who are temporarily or permanently exempt from the senior-first rule. It defies common sense to measure the effect of a policy, such as the senior-first rule, on persons to whom the rule does not apply, but the defendant's statistics did just this. *See Palmer v. Shultz*, 815 F.2d 84, 91 n. 6 (D.C.Cir. 1987) (statistical analysis must focus on appropriate source pool, which includes *only* those qualified for promotion, or in this case, those eligible for transfer); *Segar v. Smith*, 738 F.2d 1249, 1274 (1984) (same), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985). Therefore, the Court finds and accepts plaintiffs statistics as not only more credible but also because they are based on the appropriate source pool, which comprises only the postal inspectors *eligible* for a directed transfer during the relevant time period in this case.

Defendant's inclusion of exempt postal inspectors in its statistical analysis is also erroneous. Because the ADEA protects all persons 40 years of age and above, the senior-first rule's discriminatory transfers of some level 23 postal inspectors cannot be justified by its exemption of other level 23 postal inspectors. Therefore, a relevant statistical comparison looks at the effect of the senior-first rule only on the persons subjected to the Rule, which plaintiffs' witness did provide and which defendant's statistician did not provide. Indeed, this is what plaintiffs' statistics do, as they show the effect of the senior-first rule only on postal inspectors *eligible* for directed

transfers pursuant to the Career Path Policy Rule in question in this case.

Another reason plaintiffs' statistics better reflect the effect of the senior-first rule is that they use "snap shot" data rather than "average" data. Snap shot data is better because in the instant case the average data does not accurately reflect the fluctuations in the pool of eligible postal inspectors which is reflected in the snap shot data. Because the exemptions caused the composition of the class of postal inspectors eligible for directed transfer to change from day to day, the data that most accurately reflects the composition or age-mix of the class of postal inspectors subject to directed transfers is that data collected on or about the dates when directed transfers were actually made. *See* PX 52 (listing dates when directed transfers were ordered). Thus, plaintiffs' snap shot data best reflects the real and adverse effects of the senior-first rule on the protected class.

Defendant's use of average data [4] and the binomial distribution [5] is inappropriate because they do not ac-

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[4] The binomial distribution predicts the probability of transferring a postal inspector 40 years of age and older when chosen from a pool consisting of eligible postal inspectors over 40 years of age and under 40 years of age. An important caveat, however, is that the binomial distribution is valid only under three conditions: 1) each directed transfer is dichotomous, in other words, there are only two possible outcomes—that a postal inspector will be directed to transfer or will not be directed to transfer; 2) each time a directed transfer is ordered the probability of transferring a postal inspector 40 years of age and older remains constant and is in fact equal to the probability of transferring a postal inspector 40 years of age and older; and 3) the each directed transfer is independent. *See* Cangelosi, Taylor and Rice, *Basic Statistics, A Real World Approach* at 30 (West 1979). Because the age-mix of the pool of eligible postal inspectors changes daily, the probability of transferring a postal inspector 40 years of age and older does not remain constant as required by condition 2 above.

[5] An average or arithmatical mean is the sum of a set of observations divided by the number of observations. *Id.* at 25-30.

curately reflect the changing composition of the pool of postal inspectors eligible for directed transfer. An average is based on the premise that the pool of eligible postal inspectors is relatively stable, which was not the case here during the relevant period. *See* Cangelosi, Taylor and Rice, *Basic Statistics, A Real World Approach* at 30 (West 1979) (the disadvantage of the mean or average is that it will be overly influenced by extreme values). Such an assumption is inappropriate where the composition of the pool of postal inspectors eligible for directed transfer changes from day to day. Even Dr. Beckett, defendant's expert, admitted on cross examination that the averages he used did not reflect the actual number of postal inspectors 40 years of age and above located in non-major metropolitan areas.

Similarly, the use of the binomial distribution is invalid where the pool of eligible postal inspectors changes daily since a pre-condition for using the binomial distribution is that the probability of an event occurring remain constant, or in the instant case, that the age-mix of the pool of eligible postal inspectors remain constant. Here the number of postal inspectors 40 years of age and greater eligible for directed transfers changes daily. Therefore, the use of average data and the binomial distribution is improper in these circumstances. *See* Cangelosi, Taylor and Rice. *Basic Statistics, A Real World Approach* at 30 (West 1979).

That the use of snap shot data is more appropriate than average data is made clear by an example given by plaintiffs' expert, Dr. Mann. Assume on day 1 that ten directed transfers are to be ordered and that only ten postal inspectors are subject to transfer and are 40 years of age and above. Then, assume on day 2 that one directed transfer is to be ordered and that ten postal inspectors under 40 years of age are subject to transfer.

	40+	under 40	directed transfers
Day 1	10	0	10
Day 2	0	10	1
TOTALS	10	10	11

In sum, a total of eleven directed transfers were made from a pool of ten postal inspectors 40 years of age and over and ten postal inspectors under 40 years of age. Using defendant's average data, one-half of the total pool of postal inspectors subject to transfer were *under* 40 years of age and one-half *over* 40 years of age. Therefore, one-half of the directed transfers should have been of postal inspectors *over* 40 and the other half of postal inspectors *under* 40 years of age. When one looks at the pool of eligible postal inspectors on the two days directed transfers were ordered, however, it is evident that the age-mix of the pool of eligible postal inspectors changed. Because the age-mix of the pool of postal inspectors subject to transfer changed, the use of average data or the binomial distribution is misleading. *See* PX 57 at 210-11. Using snap shot data, the expected result is not misleading because it reflects what actually occurred. Using such data, ten postal inspectors at least 40 years of age would be transferred on the day 1 and that one postal inspector under 40 years of age would be transferred on day 2, since these were the only postal inspectors subject to transfer when the directed transfers were ordered. Thus, the snap shot data avoids the misleading result obtained by the average data. Accordingly, the Court finds that the use of averages and the binomial distribution upon which defendant's experts base their conclusions is inappropriate in this case because the average age-mix of the eligible postal inspectors changed from day to day. *See* PX 57.

iii. *The Statistics Establishing DISPARATE IMPACT.*

Plaintiffs' statistics prove the obvious—that the senior-first rule, by directing the most senior postal inspectors to transfer to the larger and more expensive cities, falls more harshly on postal inspectors 40 years of age and above than on postal inspectors under 40 years of age.

From 1980 through 1985 there was a strong correlation between the age and seniority of level 23 postal inspectors *eligible* for directed transfers. During this period the correlation coefficients for age and seniority ranged from .3689 to .6657 at a .000 level of significance. *See* PX 21 & 28. The .000 level of significance means that the odds are one in 1,000 that the correlation between age and seniority would have resulted from chance. Because the odds of this correlation occurring by chance are so small, the correlation must have occurred because age and seniority are related. Thus, the Court finds that the .000 level of significance is statistically significant. *See Palmer v. Shultz*, 815 F.2d 84, 92 (D.C.Cir.1987) (.05 level of significance statistically significant); *Segar v. Smith*, 738 F.2d 1249, 1283 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (same).

There is a stronger correlation between age and seniority for *all* level 23 postal inspectors, ranging from .5714 to .7155 at the .000 level of significance. *See* PX 22 & 29. There is also a statistically significant correlation between age and seniority for all postal inspectors. The correlation coefficient between age and seniority for all postal inspectors ranges from .5894 to .7236 at the .000 level of significance. *See* PX 23 & 24. These correlations further suggest that age and seniority are related and, thus, that the senior-first rule has the effect of an older-first rule.

The fact of a definite correlation between age and seniority was and should not have been surprising to defendant, as Dr. Beckett admitted on cross examination that age and seniority were correlated. In sum, whether the Court looks at the *eligible* level 23 postal inspectors, *all* level 23 postal inspectors, or all postal inspectors, the Court finds a statistically significant correlation between age and seniority. *See* PX 21-24, 28-29.

Expectedly, it follows from the correlation between age and seniority that the effect of the senior-first rule falls more harshly on older postal inspectors. Indeed, this is the case. Chief Inspector Clauson conceded that he realized Postal inspectors at least 40 years of age were disproportionately over-represented in the top deciles of the directed transfer list. *See also* PX 17, 18 & 26. Using a chi-square analysis,[6] the odds are less than one in 1,000 that this over-representation would occur by chance, which means that age and seniority are not independent. *See* PX 17-20, 26-27. During the first four years of the Policy, there was a 94.7%-100% chance that the postal inspectors at the top of the directed transfer list were 40 years of age and above. *See* PX 17, 18 & 26. Therefore, at least during the first four years of the Policy there was anywhere from a 94.7%-100% chance that the level 23 postal inspectors at least 40 years of age were subjected to directed transfer first. As more and more level 23 postal inspectors at least 40 years of age volunteered for lateral reassignments resigned to avoid directed transfers, or were directed to transfer, the number of eligible level 23 postal inspectors at least 40 years of age diminished. Accordingly, it is not surprising that

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[6] The chi-square analysis is useful in this case because it makes "no assumptions about the value of a parameter." In other words, it is useful when, as in this case, the population distribution, or the age-mix of postal inspectors here, is unknown. *See* Cangelosi, Taylor and Rice, *Basic Statistics, A Real World Approach* at 248 (West 1979).

the top deciles of the directed transfer list during the last year of the relevant time period did not contain as many postal inspectors 40 years of age and above as it did from 1980 to 1984. Here, the Court, again notes that the defendant knew of this in the beginning when they adopted the Career Path Policy in question herein. *See* DX 23 and Clauson Testimony.

The Court also finds that in the top two deciles of postal inspectors eligible for directed transfers from 1980 through 1985 the mean age was at least 40 years. *See* PX 19 & 20. This also suggests that the level 23 postal inspectors 40 years of age and above were almost always the first to be directed to transfer.

That the senior-first rule had a disproportionately harsh impact on postal inspectors 40 years of age and above is further established by Dr. Mann's results from the Mantel-Haenszel test, which measures the effect of the senior-first rule on the particular days when directed transfers were made. This test should have been utilized by the defendant. Had they done so the result would have been the same as Dr. Mann's result. Dr. Mann proved that there is a statistically significant relationship at the .004 level of significance between age and the probability of receiving a directed transfer. *See* PX 30. As previously pointed out herein, this is significant and important because it is not based on averages, but is based on the data collected on or about the time when directed transfers were actually made. Furthermore, the Mantel-Haenszel test shows that it is 1.9 to 2 times more likely that a postal inspector 40 years of age and above will be directed to transfer than a postal inspector under 40 years of age.

It is not surprising then that a statistically significant disproportionate and higher number of postal inspectors 40 years of age and above in fact received directed transfer orders. *See* PX 25 & 30. Dr. Beckett, the defendant's

expert witness, conceded the statistical significance of the disproportionate number of postal inspectors 40 years of age and above that were directed to transfer. Thus, based on all of the above statistics, the Court finds that the senior-first rule had a disproportionately harsh and adverse effect, or disparate impact, on level 23 postal inspectors 40 years of age and above.

In summary, the senior-first rule did what it was designed to do: the rule adversely impacts the plaintiffs by directing the most senior postal inspectors to transfer from the cities, towns, and hamlets across the land to large and expensive cities. An analysis of the multiplicity of statistics in this case establish that seniority was effectively a proxy for age and contrary to law. It caused the senior-first rule to have the *effect* of an older-first rule, and subjected the older postal inspectors to directed transfers first. Under a theory of disparate impact, it is the *effect* of the challenged rule that is critical. *EEOC v. Borden's, Inc.*, 724 F.2d at 1394. Thus, plaintiffs have proved the obvious: that the senior-first rule fell more harshly on plaintiffs than on postal inspectors under the age of 40 thereby establishing a violation of the ADEA.

2. *No Valid Business Necessity Justifies the Senior-First Rule.*

Because plaintiffs' statistics establish that the senior-first rule disparately impacts postal inspectors 40 years of age and older, the burden of persuasion falls upon the defendant to justify its use of the rule by showing a legitimate and nondiscriminatory business necessity for the senior-first rule. *Griggs v. Duke Power*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Leftwich*, 702 F.2d at 691; *Geller*, 635 F.2d at 1032. To establish a business necessity, defendant must have had *no other choice* but to transfer the most senior level 23 postal inspectors to fill the vacancies in the major metropolitan areas. *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1181

(5th Cir.) ("[B]usiness necessity is limited to those cases where an employer has no other choice" and here the defendant had another choice, i.e., a random method of selection), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Chrapliwy v. Uniroyal, Inc.*, 458 F.Supp. 252 (N.D.Ind.1977) (business necessity should be narrowly construed and absolutely essential). Furthermore, defendant must show that the senior-first rule bears a "manifest relationship" to the successful performance of the Postal Inspection Service's business needs. *Griggs v. Duke Power*, 401 U.S. at 424, 432, 91 S.Ct. at 854; *Segar*, 738 F.2d at 1266-67; *Geller*, 635 F.2d at 1032.

Chief Inspector Clauson testified that the senior-first rule was justified by the Postal Service's business necessity for (1) more *experienced postal inspectors* in the major metropolitan areas, (2) a *perpetual* system for remedying the storage of experienced postal inspectors in the major metropolitan areas, and (3) a *predictable* system for directing transfers of experienced postal inspectors to major metropolitan areas. It is clear that defendant has failed to carry its burden of persuading the Court that it had *no other choice* but to transfer the senior and older postal inspectors to the major metropolitan areas. The entire evidence before the Court and the Policy itself establishes that the defendant did not have a legitimate and non-discriminatory business need for what was done and did in fact have other lawful means of getting sufficient numbers of qualified postal inspectors in the major metropolitan areas without violating the ADEA by utilizing the senior-first rule.

Defendant's real need was for level 21 or higher postal inspectors, regardless of seniority. First, before the most senior level 23 postal inspector was subjected to a directed transfer, a level 23 postal inspector of *any seniority* could have been allowed to volunteer to fill the vacancy. *See* PX 16, 35 & 53. Also, if two level 23 postal

inspectors volunteered to fill the same vacancy, the postal inspector who bid first could have been given the reassignment *even if he or she is less senior* than the competing postal inspector. *See* PX 16, 35 & 53. Thus, defendant's alleged business need could have been satisfied without transferring the most senior and above 40 years of age level 23 in the nation to the high cost of living major metropolitan areas.

Secondly, the most senior level 23 postal inspector would be directed to transfer only if no qualified level 21 postal inspectors of any seniority were to volunteer. *See* PX 16, 35 & 53. This again indicates the fallacy of the defendant's position as there was only a business necessity to increase the number of level 21 *or* level 23 postal inspectors *of any seniority*, rather than the *most senior* level 23 postal inspectors, in the major metropolitan areas. Indeed, the record shows the fact to be without dispute that the level 21 and less senior level 23 postal inspectors have performed satisfactorily in the major metropolitan areas. An examination of the Career Path Policy itself and the whole record shows unequivocably that *the need for "experienced" postal inspectors in the major metropolitan areas could have been met by the reassignment of postal inspectors with far less seniority and rank than the most senior level 23 postal inspector above 40 years of age in the nation.*

There is more than ample evidence in the record to show that defendant's alleged need for "experienced" postal inspectors was no more than a need for level 21 and higher postal inspectors. Instead they adopted an illegal Career Path Policy or plan based on age to achieve their end without regard to the law and their own motives were at the least suspect. DX 23. Chief Inspector Clauson testified that level 21 and above postal inspectors of all levels of seniority performed well in the major metropolitan areas. This is not surprising since the complexity of assignments in the major metropolitan areas was not

necessarily greater than the complexity of assignments in certain non-major metropolitan areas. Indeed, just prior to implementing the senior-first rule, defendant advertised for level 21 and above postal inspectors to transfer to New York City, the major metropolitan area with the greatest need for experienced postal inspectors. *See* DX 13A-B & 14 (identifying problem in New York City as lack of experience); DX 15B (notice requesting postal inspectors level 21 and above to relocate to New York City because they possess the necessary experience); PX 34 at 311 (Chief Inspector Clauson's testimony that any level 23, regardless of seniority, qualified to fill the need in major metropolitan areas); PX 33 at 161-62 (Vance Arnold's, Assistant Inspector-in-Charge for New York, testimony that junior level 23 postal inspectors performed fine). Accordingly, the Court finds defendant's need was for qualified level 21 or above postal inspectors *regardless of seniority* and that the defendant's defense here was and is obviously without merit and pretextual.

Additionally, a task force headed by David Krasula, then Assistant Regional Chief Inspector for Administration of the Northeast Region of the defendant, submitted a report dated September 4, 1979 on the need for experienced postal inspectors in New York City. Mr. Krasula recommended the arbitrary transfer of level 21, 23 and 24 postal inspectors to the New York Division. *See* DX 14. Based on Mr. Krasula's recommendations, then Chief Inspector Fletcher, in letters dated December 6, 1979 and April 3, 1980, decided that the need for experienced postal inspectors in New York could be filled by nationwide posting of level 23 vacancies and laterally reassigning level 23 postal inspectors. Thus, Assistant Regional Chief Inspector Krasula and Chief Inspector Fletcher both suggested that the need for experienced postal inspectors could be met with level 21 or higher postal inspectors.

As previously indicated, the Court finds that there was another choice to meet the alleged need here and there certainly was no valid business necessity for transferring the *most* senior level 23 postal inspectors regardless of age and the ADEA to the major metropolitan areas; rather, the choice was to transfer experienced postal inspectors, which would have included level 21 and higher postal inspectors, to the major metropolitan areas rather than the older and most senior level 23 postal inspectors first. The senior-first rule, however, placed the entire burden of this illegal plan for level 21 or above postal inspectors on a narrow class of postal inspectors—the most senior level 23 postal inspectors who were within the protected group because of their age. Accordingly, the Career Path Policy was and is invalid.

3. *Even if Defendant Had a Business Necessity to Transfer the Most Senior Level 23 Postal Inspectors, a Non-Discriminatory Alternative Was Available.*

"It is clear that business necessity is limited to those cases where an employer had no other choice." *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1181 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976). Here, a random system was available. *See* DX 23 and Clauson Testimony. Thus, even if the senior-first rule was justified by a business necessity, plaintiffs would still prevail because another non-discriminatory random system would have met defendant's need for experienced postal inspectors. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975); *Geller*, 635 F.2d at 1032.

Chief Inspector Clauson testified that he realized the most senior postal inspectors were also the older postal inspectors and that the CPP would adversely affect those older postal inspectors. *See also* DX 23. Chief Inspector Clauson did consider, however, the use of a random sys-

tem for making directed transfers and recommended that such a random system be used because it is nondiscriminatory. *See* DX 23. Chief Inspector Clauson testified on redirect that the only way to correct the adverse effects of the senior-first rule on postal inspectors at least 40 years of age and still accomplish the Postal Service's objectives would be to use a random system. In a July 7, 1980 letter to then Chief Inspector Fletcher, then Assistant Chief Inspector Clauson warned that it is

> important that [the transfer system] be logical, nondiscriminatory, and definable. I think there is a good chance, if not certainty, that our actions and decisions will be challenged. . . .

DX 23. Then Assistant Chief Inspector Clauson recommended that eligible postal inspectors be ranked and transferred on a random basis. *See* DX 23 at 2, ¶ 3. Notwithstanding then Assistant Chief Inspector (now Chief Inspector) Clauson's warnings and recommendations, Chief Inspector Fletcher rejected the random plan.

As already noted, the Court finds that a random system would have satisfied the alleged need for a system for transferring level 21 and above postal inspectors to major metropolitan areas. First, experienced level 21 or higher postal inspectors could have been reassigned to major metropolitan areas either voluntarily or based on random directed transfers. If a sufficient number of postal inspectors did not volunteer, the vacancies could have been filled through random directed transfers. As Chief Inspector Clauson admitted during cross examination, this would have met the understaffing need by increasing the number of experienced postal inspectors in the major metropolitan areas.

Secondly, continual use of the random system would have provided a perpetual system for reassigning experienced postal inspectors to the major metropolitan areas. Postal Inspectors would have had an incentive to volun-

teer to serve in a major metropolitan area in order to avoid a directed transfer under the random system. This system would have accomplished the same goal as the senior-first rule but without violating the law.

Thirdly, the random system would have been as predictable as the senior-first rule. Because of the senior-first rule's temporary exemptions, a postal inspector's relative place on the directed transfer list changed from day to day. Chief Inspector Clauson and several plaintiffs testified that a postal inspector's relative place on the seniority list changed daily. Notices of rankings on the directed transfer list were discontinued at least once because of inaccuracies due to these daily changes. Because postal inspectors were only notified of their place on the seniority list periodically and the list was always in flux, postal inspectors rarely knew their actual ranking. In addition, postal inspectors never knew for certain when, how many, or to where directed transfers would be made. As a result, many plaintiffs volunteered for lateral reassignments to avoid imminent directed transfers which they heard about through the "grape-vine." In short, the senior-first rule was not all that predictable; a random system would be just as predictable and because it is non-discriminatory it would not impose the entire burden for experienced level 21 or above postal inspectors on the *most* senior level 23 postal inspectors.

B. *The Senior-First Rule Constitutes DISPARATE TREATMENT of Plaintiffs Because Defendant's Use the Rule as a Pretext to Discriminate Against Plaintiffs Because of Their Age.*

To prove age discrimination under a theory of disparate treatment, plaintiffs must prove that defendant intentionally discriminated against them because of their age. *United States Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983); *Texas Department of Community Affairs v. Burdine*, 450

U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1982). Generally, the order and allocation of proof set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), a Title VII case, applies to cases under the ADEA. *Krodel v. Young*, 748 F.2d 701, 705 (D.C. Cir.1984), *cert. denied*, 474 U.S. 817, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 342-43 (D.D.Cir), *cert. denied*, 464 U.S. 994, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983); *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C.Cir.1982); *Johnson v. Lehman*, 679 F.2d 918, 922 (D.C.Cir.1982).

Under the tripartite scheme of the *McDonnell Douglas* case and the cases under the ADEA that have applied that scheme, plaintiffs must first establish a prima facie case by evidence raising an inference of age discrimination. *See, e.g., Krodel*, 748 F.2d at 705.

Plaintiffs theory of disparate treatment is simple: defendant knew age and seniority were statistically correlated; defendant implemented a seniority-first rule with knowledge that seniority *was not* a neutral factor with respect to age; therefore, defendant intentionally discriminated against plaintiffs because of their age. In short, plaintiffs claim that seniority was used as a proxy for age. The Court agrees.

1. *Plaintiffs' Statistical and Antedotal Evidence Raises an Inference of Discrimination Against Postal Inspectors 40 Years of Age and Over Because of Their Age.*

Plaintiffs disparate treatment case, primarily but not exclusively, relies on the statistics showing a statistically significant correlation between eligible level 23 postal inspectors, all level 23 postal inspectors and all postal inspectors. Although plaintiffs may establish a prima facie case raising an inference of discrimination with statistics alone, *see Palmer v. Shultz*, 815 F.2d 84, 90 (D.C.Cir.

1987); *Segar*, 738 F.2d at 1278-79, there is additional evidence which is probative on this issue. *See Palmer*, 815 F.2d at 90. Chief Inspector Clauson testified that he knew age and seniority were correlated and that the senior-first rule would adversely affect the older postal inspectors. Despite Chief Inspector Clauson's premonition in his letter to then Chief Inspector Fletcher that the senior-first rule would be challenged and a non-discriminatory system should be used, *see* DX 23, defendant implemented the Rule without regard to its effect on postal inspectors 40 years of age and over and its legality under the ADEA. The Court finds that defendant's disregard of the adverse effect of the Rule on postal inspectors 40 years of age and over and the correlation between age and seniority raise far more than an inference of age discrimination. Thus, plaintiffs have established a prima facie case of discrimination under a theory of disparate treatment.

2. *Defendant Has Not Sustained Its Burden of Producing Evidence of a Legitimate, Non-Discrimniatory Business Reason for the Senior-First Rule.*

Since plaintiffs have established a prima facie case of discrimination, defendant must proffer evidence of a legitimate, non-discriminatory reason for its actions. *See, e.g., Krodel*, 748 F.2d at 705. Defendant asserts that the senior-first rule is a perpetual and predictable system for transferring experienced postal inspectors to major metropolitan areas. This is not, however, a legitimate, non-discriminatory reason for using the senior-first rule. *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093; *Krodel*, 748 F.2d at 705. As discussed in the disparate impact section above, there was no valid need for defendant to transfer the most senior level 23 postal inspectors, particularly under a senior-first rule which discriminates on the basis of age. Therefore, the Court finds that defendant has not sustained its burden of production.

3. *Plaintiffs' Have Proven by a Preponderance of the Evidence That Defendant's Reason for the Senior-First Rule Was But a Pretext for Its Discriminatory Animus.*

Assuming defendant met its burden of production above, plaintiffs must show by a preponderance of the evidence that defendant's proffered reason was a pretext to mask its illicit motive to discriminate against plaintiffs because of their age. *Id.* Plaintiffs must prove that age made a difference in defendant's decision to transfer them in the sense that, but for defendant's discriminatory motive, plaintiffs would not have been transferred. *See, e.g., Krodel*, 748 F.2d at 706.

Upon consideration of all the evidence, the Court finds that plaintiffs have proved by a preponderance of the evidence that the senior-first rule was a pretext for age discrimination in this case and the defendant knew this. *See* DX 23. Defendant knew that seniority and age were correlated and that the senior-first rule would have the same effect as an older-first rule. Moreover, as repeatedly stated herein, defendant's need was not for the most senior level 23 postal inspectors, but for level 21 or higher postal inspectors. Nevertheless, defendant directed transfers pursuant to a rule that transferred the most senior level 23 postal inspectors first. Defendant used the senior-first rule despite the availability of a non-discriminatory random system. Thus, the Court concludes, based on all the evidence in the record, including that evidence discussed above, that the senior-first rule was a pretext to mask its discriminatory animus and motive. Accordingly, plaintiffs have proved a case of disparate treatment.

4. *Defendant Knew the Senior-First Rule Violated the ADEA and, Therefore, Defendant's Conduct Was Willful.*

For the reasons set forth above, particularly the testimony of Chief Inspector Clauson and DX 23, the Court finds that defendant willfully violated the ADEA when

it forced senior postal inspectors to transfer to cities such as New York City. Defendant knew that a senior-first rule would require the older and most senior postal inspectors to transfer against their will. Indeed, that the senior-first rule transferred the older postal inspectors first was no surprise to defendant; this was precisely what defendant intended. As Chief Inspector Clauson admitted, the senior-first rule was chosen over a junior-first rule because the Postal Inspection Service wanted to force the senior postal inspectors to fill the vacancies that were not voluntarily filled—the least desirable vacancies. Moreover, defendant was well aware that age and seniority were correlated, as plaintiff proved with a multiplicity of statistics. Again, that defendant knew of the correlation between age and seniority was admitted by Chief Inspector Clauson. Finally, DX 23 not only warned of the consequences of implementing a discriminatory senior-first rule, but also recommended the use of a non-discrimintory random system. Upon consideration of all the evidence, including that discussed above, the Court finds that defendant knew the senior-first rule violated the ADEA, but implemented the Rule anyway, thus constituting a willful violation of the ADEA. *See, e.g., Trans World Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

VI. CONCLUSION

Upon thorough consideration of the record, including the testimony, the exhibits, and based upon the Court's judgment as to the credibility of the witnesses herein, the Court certifies this case as a Rule 23(b)(2) class action, grants defendant's motion to dismiss plaintiffs Brady and Rittiner as class representatives, but denies defendant's motion to dismiss Brady and Rittiner as class members, and finds that the plaintiffs did not waive their rights under the ADEA when they were unlawfully directed to transfer. More importantly, the Court finds that plaintiffs have proved that the senior-first rule violates the

ADEA under a theory of both disparate treatment or disparate impact. Acordingly, the Court will issue an order of even date herewith consistent with this Opinion.

ORDER

For the reasons set forth in the Opinion of even date herewith, it is, by the Court, this 13th day of August, 1987,

ORDERED that this case is certified as a Federal Rule of Civil Procedure 23(b)(2) class action to include

> All postal inspectors of the United States Postal Service between December 1, 1980 and September 1, 1985 who were, are, or have been affected by the senior-first rule of the Career Path Policy.

and, it is

FURTHER ORDERED that defendant's motion to dismiss plaintiffs Brady and Rittiner as class representatives is granted; and, it is

FURTHER ORDERED that defendant's motion to dismiss plaintiffs Brady and Rittiner as class members is denied; and, it is

FURTHER ORDERED that all of the class representatives and class mmebers Brady and Rittiner have standing to challenge the senior-first rule; and, it is

FURTHER ORDERED that the plaintiffs did not waive their rights to challenge the senior-first rule as a violation of the ADEA; and, it is

FURTHER ORDERED that the senior-first rule of the Career Path Policy has a disparate impact on and causes disparate treatment of postal inspectors 40 years of age and above; and, it is

FURTHER ORDERED that the defendant's conduct herein was willful within the meaning of the Age Dis-

crimination in Employment Act for the reasons set forth in the Court's Opinion of this date; and, it is

FURTHER ORDERED that the senior-first rule of the Career Path Policy is hereby declared to be unlawful and in violation of the Act insofar as it pertains to level 23 postal inspectors; and, it is

FURTHER ORDERED that defendant is hereby enjoined from ordering transfers pursuant to the senior-first rule of the Career Path Policy; and, it is

FURTHER ORDERED that the parties confer in person and file with the Court within ten days of receipt of this Order and Opinion a joint stipulation setting forth suggestions as to the remedies phase of this case, keeping in mind that expeditious resolution of the remedies phase by reference to a special master or other means may be appropriate.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5361

CLYDE J. ARNOLD, JR., *et al.*,
Appellees

v.

UNITED STATES POSTAL SERVICE,
Appellant

and Consolidated Case 87-5362

Before: BUCKLEY and D. H. GINSBURG, *Circuit Judges*, and GARTH, *Senior Circuit Judge*, U.S. Court of Appeals For The Third Circuit

ORDER

[Filed Mar. 2, 1989]

Upon consideration of appellee's petition for rehearing filed February 3, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Statement of Senior Circuit Judge Garth:

As a Senior Circuit Judge, I am only permitted to vote for panel rehearing. To the extent that Arnold's petition for rehearing seeks panel rehearing, I would grant it. I would do so for all of the reasons expressed in my panel dissent. As stated in that opinion, I believe that the Career Path Policy violates the ADEA by imposing disadvantageous conditions upon those senior inspectors protected under the Act.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5361

CLYDE J. ARNOLD, JR., *et al.*,
Appellees

v.

UNITED STATES POSTAL SERVICE,
Appellant

and consolidated Case No. 87-5362

Before: WALD, *Chief Judge*; ROBINSON, MIKVA, EDWARDS, RUTH G. GINSBURG, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

[Filed Mar. 2, 1989]

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-8

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., ET AL., PETITIONERS

v.

POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Postal Inspection Service discriminated against older employees in violation of the Age Discrimination in Employment Act of 1967 because, as part of a plan to correct a shortage of experienced postal inspectors in major metropolitan areas, it filled vacancies in those areas that no inspector volunteered to fill by selecting the most senior eligible employee who had not previously fulfilled his commitment to serve in a major metropolitan area.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

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CLYDE J. ARNOLD, JR., ET AL., PETITIONERS

v.

POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 863 F.2d 994. The opinion of the district court (Pet. App. 39a-87a) is reported at 667 F. Supp. 6.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1988. A petition for rehearing was denied on March 2, 1989 (Pet. App. 88a-89a). The petition for a writ of certiorari was filed on June 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Postal Inspection Service, the law enforcement branch of the Postal Service, is responsible for "investi-

gat[ing] postal offenses and civil matters relating to the Postal Service." 39 U.S.C. 404(a)(7). There are more than 1,900 postal inspectors, who range in grade from levels 17 through 24. Postal inspectors ordinarily spend one year as a level 17 inspector, one year at level 19, and two years at level 21 before being promoted to level 23. Level 24 inspectors are team leaders who supervise groups of inspectors from the other levels. In order to ensure the mobility of these employees, the Inspection Service is authorized by statute (39 U.S.C. 1001(e)(2)) to transfer any postal inspector, from any level, at any time. Pet. App. 4a-5a. In addition, all inspectors sign consent statements indicating that they are willing to relocate. *Id.* at 47a.

In response to a shortage of experienced postal inspectors in 14 major metropolitan areas (MMAs), particularly New York City, the Service instituted the Career Path Policy (CPP) in December 1980. The CPP provides that all level 23 inspectors should spend five years in an MMA during the course of their service. Under the CPP, level 23 postal inspectors are encouraged to apply for lateral reassignments to vacancies in MMAs of their choice at times they find convenient; if more than one level 23 postal inspector bids for such a vacancy, the first to bid receives the assignment. If no level 23 inspector applies for a vacancy, level 21 inspectors are given the opportunity to accept the post with a promotion to level 23. If a vacancy is not filled by either voluntary means, the Service chooses the level 23 inspector who is most senior, in term of service, for mandatory reassignment. Certain postal inspectors are exempt from mandatory reassignment, including those

who are eligible to retire within five years,[1] those who have relocated within the past two years, and those who have already fulfilled the requirement that they serve in an MMA. Pet. App. 5a.

Petitioners are postal inspectors who contend that the Postal Service discriminated against postal inspectors age 40 and over in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The district court ruled in their favor under both disparate treatment and disparate impact theories. It focused on that aspect of the CPP providing that, if an opening is not filled voluntarily, the most senior eligible postal inspector is assigned to the position, which it termed the "senior-first rule." In the district court's view, the Postal Service should involuntarily "transfer[] postal inspectors on a random basis" rather than select the most senior postal inspector for transfer. Pet. App. 63a.

The court of appeals reversed. Pet. App. 1a-38a. It concluded that the CPP is "a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." *Id.* at 11a. "Because the senior-first rule does not stand alone," the court stated, "it is neither fair nor reasonable to judge the motives of the Inspection Service by uncoupling the rule from the other aspects of what was clearly intended to be an integrated program." *Ibid.* It therefore rejected petitioners' disparate treatment claim. When the CPP is viewed as a whole, the court further noted, the evidence showed that "inspectors aged forty and above constituted 34.4 percent of all level 23 inspectors eligible for transfer into an MMA, and constituted 33.8 percent of all inspectors actually transferred,

[1] Pursuant to 5 U.S.C. 8335(b), postal inspectors, like other federal law enforcement officers, must retire by age 55.

either voluntarily or involuntarily." *Id.* at 9a. Accordingly, it held that there was no basis for a disparate impact claim.[2] The district court's conclusion that the Postal Service should randomly select inspectors for mandatory transfer was unfounded, the court of appeals concluded, noting that "[r]eliance on a lottery would have reduced incentives for voluntary transfers by encouraging chance-takers to gamble on the possibility that they could reach retirement without ever having contributed the five years of MMA service expected of all level 23 inspectors." *Id.* at 11a. Judge Garth, sitting by designation from the Third Circuit, dissented. *Id.* at 13a-38a.

ARGUMENT

1. With respect to the holding on petitioners' disparate impact theory, petitioners contend (Pet. 11-19) that review is warranted because the decision below conflicts with decisions of this Court, primarily *Connecticut* v. *Teal*, 457 U.S. 440 (1982), and decisions of other courts of appeals. In petitioners' view, the court of appeals erred by analyzing the Career Path Policy as a whole, and, like the district court, should have focused narrowly on the "senior-first rule."

The court of appeals did not err. As it stated, "the impact of the CPP on senior postal inspectors can be fairly measured only by taking into account those who, subject to an identical obligation, elected to fulfill their responsibility by volunteering for transfer." Pet. App. 10a. There is nothing novel about viewing the plan as a whole. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 138 (1976)

[2] The United States had argued that disparate impact analysis does not apply to ADEA claims. The court of appeals acknowledged this argument but concluded it did not need to decide that issue because "the CPP does not have a disparate impact on postal inspectors who are forty years of age or older." Pet. App. 8a.

(employee benefits analyzed as a "package" to determine whethe they were worth more to men than to women); *California Brewers Association* v. *Bryant*, 444 U.S. 598, 605-611 (1980) (rule that employees must work 45 weeks per calendar year to obtain benefits due to "permanent" employees must be analyzed as part of entire seniority system). It is undisputed that the percentage of inspectors age 40 and over who were transferred under the CPP (33.8%) fairly reflects the percentage of level 23 inspectors who were 40 or over (34.4%). Thus, the CPP, viewed as a whole, did not have a disparate impact on older inspectors.

As the court of appeals explained (Pet. App. 9a-10a), *Teal* is not to the contrary. In that case, this Court held that an employer could not use a written test in making promotion decisions that a disproportionate number of blacks failed without showing that the test was job-related, even though, as a result of affirmative action in later steps in the promotion process, the employer promoted a higher percentage of black applicants than white applicants. The Court stressed that the test constituted a "pass-fail barrier to employment opportunity" (457 U.S. at 452), and rejected the employer's "bottom line" rationale because it did not remedy the adverse effect of the test on those individuals who failed it. Nothing comparable is at issue here. Under the CPP, all postal inspectors are expected to work at least five years in an MMA. While *Teal* "focused on employment and promotion requirements that create a discriminatory bar to *opportunities*" (457 U.S. at 450 (emphasis by the Court)), this case merely involves a career responsibility applicable "to each and every level 23 employee" (Pet. App. 10a) that can be fulfilled either early or late in an employee's career. Cf. *Smith* v. *Troyan*, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976). In short, the CPP does not

eliminate any employment opportunities, but ensures that the burdens of employment are distributed fairly while giving postal inspectors as much control as possible over their careers.[3]

Nor, contrary to petitioners (Pet. 15-16), does the decision below conflict with the decisions of other courts of appeals. At issue in *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1982) (en banc), cert. denied, 464 U.S. 1017 (1983), was a "pass-fail" barrier to employment opportunity comparable to the barrier in *Teal*—a height requirement that adversely affected women applicants for jobs as police officers. No such barrier is involved in this case. The decision in *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), cert. denied, 464 U.S. 937 (1983), also relied on by petitioners, is fully consistent with the decision here. In that case, General Motors favored the retention of students of its General Motors Institute (who tended to be young) even though this meant that older employees, with more seniority, were laid off. The Third Circuit explained that the mere fact that "a short-service employee was insulated from layoff because of his status as a GMI stu-

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[3] Contrary to petitioners' contention (Pet. 14-15), this Court's recent decision in *Wards Cove Packing Co.* v. *Antonio*, 109 S. Ct. 2115 (1989), does not support their position. In the portion of the Court's opinion cited by petitioners, the Court held that plaintiffs do not establish disparate impact merely by showing that there is a disparity between the percentage of minority employees holding certain jobs and the percentage of minority persons in the relevant labor market. Rather, plaintiffs must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking." *Id.* at 2125. Here, petitioners have attacked the CPP, but they have failed to establish that, viewed as a whole, it discriminates against older employees. In *Wards Cove*, the Court did not address what sorts of employment practices should be considered together and what sorts of employment practices should be analyzed separately.

dent" at the expense of an older employee was insufficient to show disparate impact. 706 F.2d at 121. Instead, the court explained that the plaintiffs were required to present statistical proof that layoffs were predominating among older workers as a result of the entire plan. This is the same point the court of appeals made in this case in concluding that, while the effect of the CPP may be to force some older employees to transfer involuntarily to MMAs, the overall effect is age-neutral. Pet. App. 9a.[4]

There is no merit to petitioners' contention that certiorari should be granted because the court of appeals "injected a new concept into Title VII analysis—'freestanding'—but has failed to give it content." Pet. 16. The court's use of that term is simply a short-hand method of distinguishing between what this Court in *Teal* called "a pass-fail barrier to employment opportunity" (457 U.S. at 452)—which *can* form the basis for a finding of disparate impact—and one provision of a "plan" or "package"—on which such a finding cannot be based. See *General Electric Co.* v. *Gilbert*, 429 U.S. at 138. The concept is not novel and the use of the word "freestanding" to describe the concept does not justify issuing a writ of certiorari.

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[4] Nor does the Third Circuit's decision in *EEOC* v. *Westinghouse Electric Corp.*, 869 F.2d 696 (1989), petition for cert. pending, No. 88-1770 (filed May 2, 1989) which the EEOC recently asked the Court to vacate in light of *Public Employees Retirement System* v. *Betts*, 109 S. Ct. 2854 (June 23, 1989), conflict with the decision here. The issue in *EEOC* v. *Westinghouse* was whether the company could deny severance benefits to older workers who were laid off on the ground that they were eligible for pension benefits. The Third Circuit determined that the employer could not, because the severance pay plan and the pension plan were separate and "[a]ny right to severance pay was in addition to, not a part of, the preexisting vested right to retirement benefits." 869 F.2d at 705. In the present case, the CPP is plainly *one plan*.

2. With respect to the dismissal of petitioners' disparate treatment claim, petitioners focus on part of one sentence in the court's opinion – stating that the Inspection Service's refusal to instite a lottery was "devoid of any implication of animus" (Pet. App. 11a) – and contend (Pet. 19-23) that review is warranted because plaintiffs need not show that discriminatory treatment was motivated by animus toward the affected group. However, the court of appeals not only found no animus, it also found that there was no discrimination against older employees: "The CPP established that all eligible level 23 inspectors, young or old, should expect to serve five years in an MMA. Viewed in this context, the purpose of the senior-first rule was not to require that the oldest postal inspectors be transferred, but to establish a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." Pet. App. 11a.[5]

Moreover, the court of appeals correctly concluded that the Postal Service reasonably rejected the suggestion that it institute a lottery. The rule providing for mandatory reassignment on the basis of seniority to fill any vacancy in an MMA for which there is no volunteer is clearly an inducement for inspectors to volunteer for such duty at their convenience when a position opens in an MMA that an inspector considers relatively desirable. As the court of appeals stated, a lottery would sharply reduce voluntary transfers to MMAs by "encouraging chancetakers to gamble on the possibility" that they would not be selected prior to retirement. Pet. App. 11a. That would lead to more

[5] Petitioners incorrectly claim (Pet. 22-23) that the court of appeals, rather than the Postal Service, articulated that justification of the CPP. However, the Postal Service explained in its brief in the court of appeals (at 47) that "the unrebutted evidence established that under the CPP *all* eligible Level 23 Inspectors were required to serve a tour of duty in an MMA."

involuntary transfers, which the Postal Service reasonably hoped to minimize.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1989

[6] We note, finally, that to the extent that the Postal Service's policy is designed to take better advantage of the skills of its more experienced (and thus older) inspectors by assigning them to the areas with the most complex caseloads, it is entirely consistent with the aims of the ADEA – which was enacted to counteract "a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs." 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits).

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No. 89-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., *et al.*,
Petitioners

v.

POSTMASTER GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONER

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

ARGUMENT [1]

I.

The first question presented is whether the Court of Appeals properly rejected petitioners' disparate impact challenge to the Postal Service's "senior-first" practice—whereby senior employees are selected first for *involuntary* transfers—on the ground that this practice must be

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[1] Throughout this Reply, "Pet." will refer to the Petition for Writ of Certiorari. "A." will refer to the Appendix to the Petition, and "Br. Resp." will refer to the Brief of the Respondent in Opposition.

viewed in light of the Service's Career Path Policy ("CPP") as a whole. In urging that the "court of appeals did not err," respondent observes ["t]hat there is nothing *novel* about viewing the plan as a whole." Br. Resp. 4, citing *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1977). This proves far too little, because this Court has long since rejected *General Electric*'s analytic approach.

a. *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S.Ct. 2115 (June 5, 1989) emphatically disapproved the "as a whole" approach to disparate impact claims: "Our disparate-impact cases [most notably *Connecticut* v. *Teal*, 457 U.S. 440 (1982)] have always focused on the impact of *particular* hiring practices on employment opportunities for minorities." 109 S.Ct. at 2124, emphasis in original. Even as the Court rejected the attempt of the *Wards Cove* plaintiffs' to predicate their *prime facie* case on evidence that *on the whole* the employees' practices had excluded minorities, the Court reaffirmed that a defendant employer cannot prevail by showing that

> the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, [because the employees] would still have a case under Title VII, if they could show that *some particular hiring practice* has a disparate impact on minorities, notwithstanding the bottom-line racial balance in [the employer's] workforce. See *Teal*, *supra*, at 450. [109 S.Ct. at 2123, emphasis added.]

Respondent says nothing which can reconcile the decision below with *Wards Cove*. The sentence from *Wards Cove* which is quoted in part at Br. Resp. 6, n.3, *reiterates* the holding that a disparate impact claim must establish the discriminatory effect of each challenged practice. That sentence reads: "[Plaintiffs] will also have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, *specifically showing that each challenged*

practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Id.* at 2125, emphasis added. That is precisely what plaintiffs showed in this case, as the District Court found. A. 64-81.

Respondent asserts that "petitioners have attacked the CPP" (Br. Resp. 6, n.3); on the contrary, petitioners attacked *the senior-first practice.* See A. 66-67 (District Court opinion). That was the precise ground on which the Court of Appeals faulted petitioners and set aside the District Court's judgment. A. 8-10. *Wards Cove,* decided after the Court of Appeals denied rehearing, confirms that this holding was error.

Respondent observes that in *Wards Cove,* the Court did not address what sorts of employment practices should be considered together and what sorts of employment practices should be analyzed separately." Br. Resp. 6, n.3. If, as Respondent thereby suggests, *Wards Cove* and its antecedents leave open the possibility that there may be *some* "sorts of employment practices [that] should be considered together," this would militate strongly in favor of, rather than against, review in order to give guidance to the lower courts and litigants. At all events, it is clear that the decision below and *Wards Cove* cannot coexist without creating new confusion with respect to the mode of analysis of discrimination claims based on the "disparate impact" of an employmet practice.

b. Respondent's attempt to distinguish *Teal* is without substance. As noted at Br. Resp. 5, the test which was there invalidated "constituted a 'pass-fail barrier to employment opportunity' (457 U.S. at 452), and rejected the employer's bottom line rationale because it did not remedy the adverse effect of the test on those individuals who failed it." The senior-first practice establishes a "pass-fail barrier" in the same way because it directly and automatically imposes on older employees the "adverse effect" (*id.*) of involuntary transfer to an MMA. See Pet. 13.

Respondent observes further that "*Teal* 'focused on employment and promotion requirements that create a discriminatory bar to *opportunities*' (457 U.S. at 450 (emphasis by the Court))." Br. Resp. 5. Insofar as Respondent seeks to distinguish between "opportunities" and certainties, and to convey the impression that all Level 23 employees would *inevitably* have to work at an MMA at some time in their career, the implication is contrary to the District Court's findings (A. 49-50), which were not disturbed on appeal. See Pet. 17, n.9. Respondent's own witness testified (and it is clear on the face of the CPP itself) that not every Level 23 employee would be required to work at an MMA. See Pet. 5. Cf. Respondent's careful formulation, "Postal inspectors are *expected to* work at least five years in an MMA." *Id.*, amphasis added.[2]

If Respondent is also attempting to distinguish between opportunities for employment benefits and "burdens of employment" (*id.* 6), with the implication that *Teal* does not apply to the latter, the proposed distinction wrests the quoted passage out of its context in *Teal* and lacks any basis in antidiscrimination law. Indeed, when this Court did differentiate between benefits and burdens, it held employers to a *stricter* standard of equal treatment in the distribution of burdens. See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142 (1978), distinguishing *General Electric* on this basis. ("Here, by comparison, petitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a sugbstantial burden that men need not suffer.") The assertion that the CPP "insures that the burdens of employment are distributed fairly * * *" (Br. Resp. 6) confuses "the *purpose* of the senior-first rule"

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[2] See also Br. Resp. 2 ("* * * all level 23 inspectors *should* spend five years in an MMA during the course of their service, (emphasis added); *id.* at 8 ("* * * all eligible level 23 inspectors, young or old, *should expect to* serve five years in an MMA (emphasis added)."

(A. 11, emphasis added) with its actual effect; since not all level 23 employees will have to work in an MMA, this practice "falls more harshly on the postal inspectors 40 years of age and above than the postal inspectors under 40 years of age," as the District Court found. A. 72. It therefore distributes the burdens not "fairly," but in violation of the ADEA.

c. *General Electric Co.* v. *Gilbert*, *supra*, cited at Resp. Br. 4 and 7, has not only been superseded by *Teal* and *Wards Cove;* it was distinguished on the very point for which Respondent cites it by *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), cited at Pet. 12, n.6.[3] *Manhart* was, in turn, followed in *Teal*, where this Court said:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individ-

[3] In *Manhart* the Court explained:

> In *Gilbert* the Court did note that the plan as actually administered had provided more favorable benefits to women as a class than to men as a class. This evidence supported the conclusion that not only had plaintiffs failed to establish a prima facie case by proving that the plan was discriminatory on its face, but they had also failed to prove any discriminatory effect.
>
> In this case, however, the Department argues that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex. But even if the Department's actuarial evidence is sufficient to prevent plaintiffs from establishing a prima facie case on the theory that the effect of the practice on women as a class was discriminatory, that evidence does not defeat the claim that the practice, on its face, discriminated against every individual woman employed by the Department. [435 U.S. at 715-16, footnotes omitted.]

ual is unambiguous." *Id.* at 708. [457 U.S. at 455.]

d. In *California Brewers Assn.* v. *Bryant*, 444 U.S. 598 (1980), cited at Br. Resp. 5, no question of "disparate impact" was raised or decided. The issue was whether the challenged employment practice was or was not "a 'seniority system' or part of a 'seniority system' within the meaning of § 703(h)," *id.* at 601, and, therefore, "exempt from the normal operation of Title VII," *id.* at 607. That is the issue decided *id.* at 605-11 to which Respondent refers.[4] Since "the principal feature of any and every 'seniority system' is that *preferential treatment* is dispensed on the basis of some measure of time served in employment" (*id.* at 606), Respondent's reliance on *Bryant* to support a practice which *disfavors* senior employees is bizarre.

e. According to Respondent, the Court of Appeals' use of the term "freestanding" is "simply a short-hand method of distinguishing between * * * 'a pass-fail barrier to employment opportunity' (457 U.S. at 452)—which *can* form the basis for a finding of disparate impact—and one provision of a 'plan' or 'package'—on which such a finding cannot be based. See *General Electric Co.* v. *Gilbert*, 429 U.S. at 138." (Br. Resp. 7, emphasis in original.) The foregoing attributes to the Court of Appeals an argument which was pressed upon it by Respondent,[5] but which the Court did not accept.[6] It be-

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[4] The Court of Appeals, having concluded that the challenged practice was not exempt under § 703(h), had remanded the case to the District Court to enable the plaintiff to prove that it "has had a disparate impact on negroes * * *." *Id.* at 605.

[5] See Brief for Appellant, p. 20:

> The heart of this action is whether the various components of the CPP should be analyzed as an integrated "package" under the *General Electric Co.* v. *Gilbert*, 429 U.S. 129 (1976), line of cases or as separate, discrete practices under the *Connecticut* v. *Teal*, 457 U.S. 440 (1982), line of authority.

[6] See A. 8-10. Notably, the Court nowhere cites *General Electric* or refers to a "package" or a "plan."

speaks little confidence in the merit of the Court of Appeals' decision that in defending it Respondent deems it necessary to resuscitate *General Electric*. As we have shown, *Nashville Gas* holds that *General Electric* does not apply to a rule which imposes special employment burdens on a protected group, and with respect to fringe benefit plans the presently controlling precedent is not *General Electric* but *Manhart*. *See supra*, p. 4, and p. 5. If Respondent is also arguing that an employment practice which is part of a "plan" cannot form the basis of a dispaarte impact finding, the argument is at war with *Teal*, for the challenged test was part of Connecticut's overall plan for selecting employees for promotion, just as the senior-first rule is part of the Postal Service's plan for selecting employees to work in MMAs; so too, that rule constitutes a "pass-fail barrier" no less than the *Teal* test. See p. 4, *supra*. Thus, if antidiscrimination law draws a line such as Respondent posits, this case is on the *Teal*—and *Wards Cove*—side of it. Moreover, since *Teal* followed *Manhart* without suggesting that there is any difference in analysis between the cases (see p. 5, *supra*), it is plain that Respondent's proposed distinction is without legal significance.

II.

a. The second question presented raises two issues concerning the Court of Appeals' rejection for petitioner's disparate treatment claim. The first of these is whether the court erred in requiring proof of animus to sustain that claim despite the Chief Postal Inspector's admission that he *knew* that the senior-first rule would select the older inspectors for directed transfer. See the District Court's finding, A. 73-74, 79, 83, cited at Pet. 20. The Court of Appeals excused the Service because the rule was "*both rational* and devoid of any implication of animus." A. 11, emphasis added to show the critical words omitted at Br. Resp. 8. Respondent says that "the court of appeals not only found no animus, it also

found that there was no discrimination against older employees." *Id.* The language which Respondent quotes cannot bear this meaning. The Court therein expressly referred to "'the *purpose* of the senior-first rule.'" *Id.*, quoting A. 11, emphasis added. Moreover, the sentence immediately preceding those from which Respondent quotes reads in full: "Because the senior-first rule does not stand alone, however, it is neither fair nor reasonable *to judge the motives* of the Inspection Service by uncoupling the rule from the other aspects of *what was clearly intended* to be an integrated program." *Id.* emphasis added.

b. The second issue on the disparate treatment phase of the case is whether a court may supply its own justification for an employment practice which the employer never articulated. Pet. 22-23. Respondent denies "that the court of appeals, rather than the Postal Service, articulated that justification of CPP." Br. Resp. 8, n.5. In support, Respondent cites only a passage from p. 47 of its *brief in the Court of Appeals.* This is plainly insufficient to meet our point since, under this Court's precedents, a nondiscriminatory jurisdiction must be established by evidence in the trial court, rather than by argument on appeal. *Wards Cove*, 109 S.Ct. at 2126, following *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). See Pet. 23. Moreover, the argument to which Respondent now refers was presented not to supply a justfiication for the senior-first rule but only to urge (unsuccessfully) that all inspectors would have been transferred whether or not that rule was used. In fact, the Service did advance three justifications through testimony in the District Court, but this was not one of them. See A. 76 and Pet. 23, n.13. After having been rejected by the District Court, these were reasserted at pp. 39-40 of the Service's brief below.

Respondent closes by asserting that senior-first rule was designed to take advantage of older Inspectors' skills

by assigning them to areas with the most complex caseloads. Br. 9, n.6. Notwithstanding the careful qualification "to the extent that", Respondent thereby admits a conscious decision to select older employees for transfer to vacant positions in MMAs (amplifying the Chief Postal Inspector's testimony, p. 7, *supra*), and that in fact older Inspectors *were* required to work in MMAs in preference to their younger colleagues.[7] This is tantamount to a confession that the senior-first policy provides for disparate treatment in violation of the ADEA. For the true "aim of the ADEA" (Br. Resp. 9, n.6) to protect older workers can only be defeated if their abilities are recognized by imposing special burdens on them.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Certiorari, the Petition should be granted. The case should be set for briefing and argument or alternatively remanded for reconsideration in light of *Wards Cove Packing Co.* v. *Atonio.*

Respectfully submitted,

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[7] Respondent's point was asserted as a business justification to petitioner's disparate impact claim but was rejected by the District Court. A. 77.